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Case Comments

Antitrust: Horizontal Territory Allocation and the Per Se Rule

Defendant Topco Associates was a wholly owned grocery-buying cooperative consisting of 25 small and medium-sized supermarket chains doing business in 33 states. Each member operated under its own name rather than that of Topco. The association practiced no profit pooling or centralized management. Topco functioned principally as its members' purchasing agent for more than 1,000 grocery items, approximately 60 per cent of which were sold by the members under private labels such as "Top Frost."¹ The association acted as trademark licensor to members for these private-label products. Trademark licensing was conducted principally on a closed-territory basis; generally, no member could sell Topco-label products in another member's geographic market, and each member in practice possessed veto power over entry of other members into his territory.

The Justice Department sued to enjoin Topco's closed-territory trademark licensing program, contending that it was a per se violation of Section 1 of the Sherman Act for Topco members to agree among themselves to allocate exclusive territories for the sale of Topco-label products. The district court held for Topco, accepting the defense that Topco's trademark licensing program was procompetitive. Topco convinced the district court that only through use of cooperative buying power² and a private-label program³ had the small chains which made up the association achieved a significant position in the retail food indus-

1. The remaining Topco-procured products were unbranded. A "private-label" product is one sold under a trademark owned by someone other than the manufacturer, in this case a retailers' cooperative association. "Private" brands, such as A&P's "Bokar" coffee, are distinguished from "manufacturer's" or "national" brands, such as General Foods' "Maxwell House."

2. The competitive significance of cooperative buying power is discussed in the district court opinion, 319 F. Supp. 1031, 1034 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).

3. The crucial importance of private labels in the supermarket industry is discussed in the Supreme Court opinion, 405 U.S. 596, 599 n.3, and in the district court opinion, 319 F. Supp. 1031, 1035-36.

try;⁴ that while no single Topco member could have developed a private-label program to compete effectively with the large national supermarket chains,⁵ the members as a group were able to do so; and that territorial exclusivity was an essential feature of the private-label program.⁶ On appeal, the Supreme Court reversed, *holding* that the horizontal⁷ territory allocation in Topco's trademark licensing program constituted a per se violation of Section 1 of the Sherman Act and, therefore, that evidence of the alleged reasonableness or procompetitiveness of such restraints could not be received. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).⁸

While the literal language of Section 1 of the Sherman Act forbids every "restraint of trade," the Supreme Court has consistently construed the act to proscribe only "undue"⁹ restraints. One approach to a Section 1 case, therefore, is a "rule of rea-

4. Total 1967 sales of Topco members were \$2.3 billion; if aggregated, Topco would at that time have ranked fourth in the industry, behind A&P, Safeway, and Kroger.

5. The district court found: "A competitively effective private label program to be independently undertaken by a single retailer or chain would require an annual sales volume of \$250 million or more and in order to achieve optimum efficiency, the volume required would probably have to be twice that amount." 319 F. Supp. at 1036. In 1967, Topco's largest member had a sales volume of \$182.8 million. *Id.* at 1033.

6. One of Topco's expert witnesses testified that the association would experience considerable difficulty in attracting new members and holding onto existing members without territorial exclusivity in the private-label program. Brief for Appellee at 51-52 n.51.

7. A "horizontal" agreement is one among direct competitors. A "vertical" agreement is one among firms at different levels of distribution, e.g., among a manufacturer and his vendee wholesalers.

8. *Rev'g* 319 F. Supp. 1031 (N.D. Ill. 1970).

The Court also held Topco's wholesaling restrictions, which amounted to horizontal customer limitations, illegal per se, 405 U.S. at 612. This aspect of the holding, which seems compelled by *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), will not be discussed at length.

In a previous decision, the Supreme Court indicated that a per se rule might be inappropriate should "a number of small grocers . . . allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements" in order to compete more effectively with large grocery concerns, *United States v. Sealy, Inc.*, 388 U.S. 350, 357 (1967). On the surface, *Topco* appears to present that situation. Presumably, however, the Court accepted the Government's argument that "the members of Topco, with combined sales of more than \$2.3 billion, are hardly small grocers. Topco includes many large chains with significant market shares." Jurisdictional Statement at 9-10 & n.11.

9. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

son"¹⁰ analysis of industry conditions and of the purpose and effect of the challenged restraint. A recognized defense in a rule of reason case is a demonstration that the challenged restraint is in fact procompetitive rather than anticompetitive.¹¹ However, a number of practices, such as price fixing,¹² tying arrangements¹³ and collective refusals to deal,¹⁴ have been held "unreasonable per se" under Section 1 of the Sherman Act. Once a commercial practice is placed in such a "per se" category, it is "*conclusively* presumed to be unreasonable and therefore illegal,"¹⁵ and evidence tending to show the practice's "reasonableness" or procompetitive effect will not be received.

Despite ample dicta to the effect that horizontal territory allocation is illegal per se under the Sherman Act,¹⁶ the issue was not firmly settled prior to *Topco*. The great majority of cases involving horizontal territory allocation have also involved at least one other trade restraint more clearly unlawful per se,¹⁷

10. *Id.* at 62.

11. *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 597-98 (1936); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933). The Court in *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-65 (1963), repeatedly used the term "anticompetitive" to describe practices which will be held unlawful in rule of reason cases, implying that the pro-competitiveness defense has continuing vitality.

12. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); *United States v. Univis Lens Co.*, 316 U.S. 241 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

13. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

14. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

15. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (emphasis supplied).

16. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 377-82 (1967); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 878 (1st Cir. 1966); *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (9th Cir. 1954); *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

17. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (price fixing, profit pooling); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (price fixing); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (price fixing); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954) (price fixing, refusal to deal); *Pennsylvania Water & Power Co. v.*

most often price fixing. Although *Topco* involved both territory allocation and a resale customer restriction, the Court's treatment of the latter is summary and the decision focuses almost exclusively on the territory allocation. Prior to *Topco* the Supreme Court had never invalidated a horizontal territory allocation scheme without discussion of an accompanying anti-trust violation, and the few lower court decisions dealing with this precise issue are conflicting.¹⁸

Topco validates the dictum in *United States v. Arnold, Schwinn & Co.*,¹⁹ that once title and risk of loss have passed, it is per se unlawful for a manufacturer to impose territorial or customer restrictions on resale by his vendees. The Court there rejected Schwinn's arguments, similar to *Topco*'s, that the market division was lawful because adopted "to enable [Schwinn] and the small, independent merchants that made up its chain of distribution to compete more effectively in the marketplace."²⁰ The *Topco* opinion removes any doubts created by the *Schwinn* Court's express notation that only the issue of customer restrictions was before it.²¹

Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir.), cert. denied, 340 U.S. 906 (1950) (price fixing, customer restrictions); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) (price fixing); *United States v. Serta Associates, Inc.*, 296 F. Supp. 1121 (N.D. Ill.), aff'd mem., 393 U.S. 534 (1969) (price fixing); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.), aff'd per curiam, 417 F.2d 621 (2d Cir. 1969) (price fixing, customer restrictions); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951) (profit pooling); cf. *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971), prob. jur. noted, 406 U.S. 944 (1972) (refusal to deal).

18. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961), supports the *Topco* holding in the sense that it equates territory allocation to customer restrictions, which are clearly illegal per se under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). *Montana-Dakota Util. Co. v. Williams Elec. Coop., Inc.*, 263 F.2d 431 (8th Cir. 1959), held a territory-allocation contract between two electric utilities void as contrary to public policy, relying only in part on § 1 of the Sherman Act. On the other hand, *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403 (5th Cir. 1962), held horizontal territory allocation lawful where incident to trademark licensing and where "[t]he division of territory was not the central purpose of the contract." *Id.* at 409. The facts of *Denison Mattress* are quite difficult to distinguish from *Topco*.

19. 388 U.S. 365 (1967).

20. *Id.* at 374.

21. *Id.* at 367-68. As Chief Justice Burger points out in his dissent to *Topco*, 405 U.S. at 617-18, *Schwinn* is a confusing opinion. The Court notes that the territory allocation issue is not before it, but nevertheless discusses it; states that the case will be decided under a rule of reason analysis, but nevertheless uses per se language; and holds that the

The rationale of the *Topco* decision is uncomplicated; the Court felt that prior cases had made it clear that horizontal territory allocation is illegal per se.

This Court has reiterated time and time again that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.²²

But as Chief Justice Burger's dissent²³ forcefully demonstrates, the majority in *Topco* went far beyond the requirements of *stare decisis* and established a new per se rule. Horizontal territory allocation alone had not previously been discussed by the Supreme Court. Thus the majority opinion is internally inconsistent in holding horizontal territory allocation illegal per se after acknowledging that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."²⁴ Also disturbing is the majority's reliance upon the dictum from *White Motor Co. v. United States*²⁵ to the effect that horizontal territory allocation is illegal per se, since the Court in *White Motor* refused to apply a per se rule to a trade restraint before it for the first time, expressly holding that it lacked the requisite "considerable experience."²⁶ The Court's description of *United States v. Sealy, Inc.*²⁷ as "on all fours with"²⁸ *Topco* is also disturbing since the *Sealy* decision held the territory allocation in question illegal in the context of a price-fixing agreement.²⁹

case involves vertical restraints, but nevertheless fails to explain why, or whether, it would make a difference were the restraints horizontal.

22. 405 U.S. at 608 (citation omitted).

23. *Id.* at 613-24.

24. *Id.* at 607-08. The opinion here cites Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964). See also J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 122-23 (1970).

25. 372 U.S. 253, 263 (1963).

26. This is the first case involving a territorial restriction in a vertical arrangement. . . .

. . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack * * * any redeeming virtue" and therefore should be classified as per se violations of the Sherman Act.

Id. at 261, 263 (emphasis in original) (citations omitted).

27. 388 U.S. 350 (1967).

28. 405 U.S. at 609.

29. *Sealy* is clear precedent for the proposition that *Topco's* arrangement was horizontal rather than vertical, as it might appear at first glance. A more detailed discussion of this point appears in Note, *Territorial Restrictions and Per Se Rules—A Reevaluation of the Schwinn and Sealy Doctrines*, 70 MICH. L. REV. 616, 631-32 (1972). *Sealy* would also provide strong support for deciding *Topco* on an "aggregation of

Although frequently cited for the proposition that horizontal territory allocation is illegal *per se*, the cartel cases³⁰ relied on by the Court uniformly involved territory allocation *plus price fixing* by parties with dominant market power,³¹ and therefore are not direct authority for application of a *per se* rule to territory allocation alone by parties without dominant market power. While the mechanism used to suppress competition in a cartel arrangement is joint action by parties collectively possessing dominant market power, the mechanism used to suppress competition in the *Topco* situation was trademark licensing. Anti-trust policy ordinarily does not condemn the limited monopoly power possessed by holders of patents, copyrights, and trademarks. Ordinarily it does condemn the monopoly power possessed by a cartel, since a cartel arrangement effectively converts a multi-seller industry into a one-seller industry. If the argument of defendants is accepted, territory allocation in the *Topco* context exists to promote effective interbrand competition in grocery products through insulation of the parties to the agreement from intrabrand competition.³² Territory allocation in the cartel context exists only as a means of apportioning the profits of an agreement to maximize total industry revenue through price increases and restriction of output.³³ Further,

trade restraints" theory, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), by considering the territorial and customer restrictions together. The Court in *Topco*, however, chose to deal with these issues individually.

30. *E.g.*, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. National Lead Co.*, 332 U.S. 319 (1947); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). An excellent nontechnical discussion of cartel theory appears in D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 7-24, 158-78 (1959).

31. *National Lead* and *Timken* involved global market divisions and price fixing by the world's leading manufacturers of titanium pigments and roller bearings, respectively. *Addyston Pipe* concerned market division, price fixing, and profit pooling by the producers of more than 56% of the cast iron pipe manufactured in the allocated territories.

32. Vertical territory allocation to promote interbrand competition at the expense of intrabrand competition has been held not to be a *per se* violation of § 1 of the Sherman Act. *Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964). However, the reasoning of *Sandura* may have been undermined if it is correct to read *Topco* as severely limiting, or eliminating, the "net procompetitiveness" defense. See note 40 *infra* and accompanying text.

33. In the classic Supreme Court cartel cases, note 30 *supra*, territory allocation clearly could not have taken place without the dominant market power which distinguishes the cartel situation from the *Topco* situation. Since a decline in the number of effectively-competing sellers of a product in a geographic market should encourage entry of

Topco's territory allocation arguably had an important justification in permitting a group of small trademark licensors to compete on equal footing with large, powerful trademark licensors.³⁴ Cartel arrangements have the arguable justification that they attain the most efficient industry-wide production levels in the long run, but such agreements are clearly at odds with antitrust policy in that they involve power to charge monopolistic prices. Territory allocation among parties with dominant market power is therefore quite different from territory allocation among parties without dominant market power, and it should not be too quickly assumed that the same legal standard should apply to both situations.

Despite the weakness of the Court's reliance upon prior cases, the *Topco* decision does echo three recurrent themes in antitrust law. One is the notion that courts are unsuitable forums to decide complex economic issues. Another is the consistent unwillingness of courts to permit continuation of business practices which offer substantial *potential* for abuse. A third is the more general Sherman Act policy of promoting competition,

competitors, it would make little economic sense for sellers of relatively fungible products such as pipe, roller bearings, and pigments to allocate territories among themselves unless collectively they possessed dominant market power, i.e., unless most potential competitors were already parties to the cartel agreement.

34. Another arguable justification is pointed out in Note, *Territorial Restrictions and Per Se Rules—A Reevaluation of the Schwinn and Sealy Doctrines*, 70 MICH. L. REV. 616, 635 (1972) (emphasis supplied):

In *Topco's* circumstances, smaller stores were given the opportunity to compete with the large national chains. *Without the restrictions as an inducement, the stores would not have been able to form the cooperative with its attendant economies of scale.* In this respect, the restriction was truly ancillary to an agreement furthering competition. And if at some later time the restriction did prevent some intrabrand competition, it restrained a competition that had become possible only because the *Topco* arrangement itself had been so successful and had facilitated the expansion of the member stores into new market areas.

Establishing the truth of the italicized proposition is absolutely crucial to *Topco's* argument that it does not fit into the fold of the *per se* illegal market-division cartel cases. *Topco* would have considerable difficulty showing that there was any business justification at all for its territory allocation unless the proposition were proved. As indicated in note 6 *supra*, one of *Topco's* expert witnesses testified that the private-label program could not function without territorial exclusivity, and this testimony was presumably one of the principal reasons why the District Court held for *Topco*. In view of the importance of this issue to the question of whether *Topco* should be permitted any territorial exclusivity whatever, such as the five-mile-radius rule suggested in the text following note 53 *infra*, it is perhaps unfortunate that the Supreme Court's analysis of the case renders the issue essentially irrelevant. The Court disposes of it in a footnote, 405 U.S. at 605 n.8.

articulated in Justice Black's statement that the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."³⁵

The *Topco* opinion notes the principal reason for a *per se* rule:

The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.³⁶

This justification for *per se* rules appears in many antitrust cases.³⁷ There are of course many cases which do not fit into a *per se* category and in such instances the courts presumably must continue to make the difficult and delicate economic judgments

35. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Of course, as Professor Bork points out, "the policy of promoting competition is only half a policy. Competition is the name of a process, not of an ultimate desideratum, and so implies a further value." Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Part I, 74 YALE L.J. 775, 831 (1965). Bork states that antitrust law should "distinguish consistently between agreements which 'regulate' or eliminate competition for its own sake and those which do so as an inevitable incident in the creation of new efficiencies." *Id.* at 821. He views this distinguishing process as one of interpreting the antitrust laws so as to "maximize consumer want satisfaction" through analysis of the extent to which a challenged agreement confers power to restrict output, on the one hand, and the extent to which it creates efficiency, on the other. *Id.* at 829-38.

36. 405 U.S. at 609-10.

37. Justice Black has noted that inquiry into whether any particular trade restraint is "reasonable" proves "often wholly fruitless when undertaken." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). The opinion in *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927), states that a court can only determine what is a "reasonable" price "after a complete survey of our economic organization and a choice between rival philosophies," a consideration which dictates the use of a *per se* rule in price-fixing cases. Judge (later Chief Justice) Taft warned that courts attempting to determine the reasonableness issue "set sail on a sea of doubt." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). And *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963), a merger case under Section 7 of the Clayton Act, uses language strikingly applicable to the *Topco* situation:

[A]nticompetitive effects in one market [cannot] be justified by procompetitive consequences in another

. . . .

. . . . We are clear . . . that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence

which characterize the rule of reason approach.³⁸ The *Topco* opinion, however, appears to go beyond the argument that such judgments should be made in as few cases as possible. The Court suggests that it has no statutory authority to entertain the "net procompetitiveness" defense that the lessening of competition in *Topco*-branded products is justified by the increase in competition in the total supermarket industry:

Whether or not we would decide this case the same way under the rule of reason . . . is irrelevant to the issue before us. . . . If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not . . . by the courts.³⁹

This reading of *Topco*, if accurate, has startling implications: small firms may not work together in any way to achieve the economies of scale which large firms possess, since in doing so they must to some degree inevitably lessen competition among themselves. Not long ago in *White Motor Co. v. United States* the Supreme Court stated that vertical territory allocation "may be allowable protectio[n] against aggressive competitors or the only practicable means a small company has for breaking into or staying in business."⁴⁰ Hopefully, *Topco* does not foreshadow a departure from the view that such arguments are defenses in Sherman Act litigation, nor from the consistent interpretation that the Sherman Act forbids only *undue* restraints of trade.

Courts in antitrust cases have also repeatedly expressed concern about the potential for abuse where a trade restraint such as the one in *Topco*, found to be "reasonable" or "procompetitive" at the time of litigation, is permitted to continue. Two

38. Justice Brandeis, in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), indicates that:

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

The *Chicago Board of Trade* opinion clearly balances the anticompetitive against the procompetitive effects of the challenged restraint.

39. 405 U.S. at 609, 611. Justice Blackmun's concurring opinion, *id.* at 612-13, supports this reading of the majority's decision:

The conclusion the Court reaches has its anomalous aspects for surely . . . today's decision in the Government's favor will tend to stultify *Topco* members' competition with the . . . larger chains. The bigs, therefore, should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest. . . . Relief, if any is to be forthcoming, apparently must be by way of legislation.

40. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

abuses were already taking place by the time the *Topco* case reached the Supreme Court. Customer limitations were involved in the association's wholesaling restrictions,⁴¹ and the exclusive-territory system was interfering with the orderly expansion of *Topco* members and of the association itself.⁴² In several cases members had apparently vetoed competitive entry into entire counties in which the vetoing member held a trademark license but did no business.⁴³

Potential for abuse is more obvious when a court is dealing with price fixing than when it is considering territory allocation. The Court in *Topco* reasoned by analogy in stating: "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."⁴⁴ The "power to fix prices . . . involves power . . . to fix arbitrary and unreasonable prices,"⁴⁵ and it is equally true that *Topco*'s power to divide markets, if upheld, would involve the power to do so unreasonably. As a matter of statutory construction, courts probably should avoid importing the express incipency standard of the Clayton Act⁴⁶ into Sherman Act litigation. It is certainly arguable, however, that even if at the time of trial a horizontal territory allocation scheme appears reasonable and procompetitive, it is so inherently likely, sooner or later, to have a net anticompetitive effect that it must not be permitted to continue under the Sherman Act.

41. Note 8 *supra*.

42. The potential for a third type of abuse in *Topco*, price manipulation, is discussed in Comment, 12 B.C. IND. & COM. L. REV. 1240, 1252-54 (1971). Of course, some degree of price manipulation is actually an objective of a private-label program such as *Topco*'s. The grocer hopes to build customer loyalty to his private brand and thereby to obtain some pricing freedom vis-a-vis competing brands. The pricing freedom enjoyed by a seller of a trademark-differentiated product, however, is far less than that enjoyed by a pure monopolist or by a cartel, since there is substantial cross-elasticity of demand among trademark-differentiated products in "monopolistic competition." See generally E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1932); P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* 38-48 (1970).

43. Brief for Appellant at 7-9, 26 & nn. 8, 10, 18.

44. 405 U.S. at 611.

45. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

46. In *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947), discussing § 3 of the Clayton Act, the Supreme Court stated:

Under the law, agreements are forbidden which "tend to create a monopoly," and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.

Under § 1 of the Sherman Act, on the other hand, the law presumably *must* "await arrival at the goal," since a restraint of trade is not unlawful until it becomes unreasonable.

Consistent with the antitrust policy of promoting competition in the economy as a whole, a balance should have been struck between the two competing goals of providing maximum competition in the retail sale of Topco-label products and in the retail grocery industry generally. Such a compromise should allow a healthy Topco private-label program, since such a program is vital to the economic well-being of the Topco member chains and thus to preservation of competition in the supermarket industry. The compromise should also provide for some intrabrand competition in Topco-label products. Under this analysis, Topco's territory allocation should be considered a "per se" violation of the Sherman Act only if it suppressed more competition in Topco-label products than necessary to achieve effective competition at the industry level⁴⁷—that is, only if the territory allocation were "capable of increasing the integration's efficiency [but] broader than required for that purpose."⁴⁸ An early antitrust case involving covenants not to compete took this approach: "To sustain the restraint, it must be . . . limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee."⁴⁹

Topco's arrangement falls under this analysis. The goals

47. The phrase "per se" is not used in the conventional sense here. To elaborate on this reasoning, a horizontal territory allocation should be held per se illegal under § 1 of the Sherman Act unless the defendant alleges a procompetitive purpose. If the defendant does make such an allegation, the territory allocation remains "per se" illegal if the court finds it more restrictive than necessary to achieve the procompetitive purpose. Should the court find that the challenged restraint is not broader than required to achieve the alleged procompetitive purpose, it should proceed with a rule of reason analysis to determine whether the purpose is, in fact, being achieved.

The tying arrangement cases, note 13 *supra*, provide a useful analogy. A tying arrangement is illegal per se only when "a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958). Neither in tying arrangement cases, nor in territory allocation cases under the analysis advocated here, is the per se rule used in an entirely mechanical way. The conclusion of illegality does not follow immediately from the categorization of the challenged restraint. The tying arrangement cases likewise proceed to a rule of reason analysis if the two prerequisites for use of a per se rule are not met. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

48. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Part II, 75 *YALE L.J.* 373, 474 (1966).

49. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 406 (1911).

of a private-label program would clearly be frustrated if four supermarkets within a one-square-mile area all sold the same private-label product. Although the grocer selling private-label merchandise who seeks to build customer loyalty to his specific store cannot do so if the customer can obtain the same product at some other store, it cannot be contended that in order to maintain a healthy private-label program, one Topco member requires the power to exclude another member from entire counties in which the first member does no business. And as pointed out above,⁵⁰ Topco's territory restrictions not only prevent intrabrand competition, but impede the orderly expansion both of Topco and of its members. On the other hand, healthy private-label programs arguably assist small food processors, who lack the advertising budgets necessary for effective promotion of their own trademarks and therefore must sell their products under someone else's label.⁵¹ The problem is not, therefore, simply suppression of intrabrand competition versus promotion of inter-chain competition in the supermarket industry. The anticompetitive effects of Topco's territory restrictions on the supermarket industry (interferences with growth of Topco members *qua* members of the grocery trade) and the procompetitive effects of Topco's private-label program on the food-processing industry are also part of the equation.⁵²

The major failure of the *Topco* opinion is that it does not distinguish agreements broader than required to achieve the alleged procompetitive purpose from those no broader than required. It may be that in Topco's case, some suppression of intrabrand competition is "an inevitable incident in the creation of new efficiencies,"⁵³ and therefore is to be condoned rather than condemned by the Sherman Act. Survival of the private-label program may dictate that, at a minimum, no Topco member should be permitted to sell Topco-label products within five miles of another member's store. If the *Topco* opinion's rationale is fully accepted, however, such an agreement is just as unlawful as the one presented to the Court. It remains to be seen whether Topco will adopt a narrower territory restriction and, if it does, whether the Justice Department will choose to contest it.

50. See text accompanying note 42 *supra*.

51. The District Court in *Topco* so found, 319 F. Supp. at 1035.

52. It should be observed that Topco did not identify in its brief any substantial evidence of the procompetitive effect of its scheme in the food processing market.

53. Bork, *supra* note 35, at 821.

Corporations: Shareholder Demand for Inspection
of Shareholder Lists and Corporate Records Lacks
Proper Purpose Where Shareholder Not Motivated
by Genuine Concern for His Economic Investment

Petitioner-appellant Pillsbury, a shareholder¹ of respondent, Honeywell, Inc.,² believed Honeywell's manufacture of weapons and munitions was morally irresponsible and should be stopped. He sought to learn more about this aspect of Honeywell's business, to communicate his findings to other shareholders, and ultimately to solicit proxies in an attempt to elect one or more directors who would represent his views. To this end Pillsbury demanded production of Honeywell's original and current shareholder ledgers and all records dealing with weapons and munitions manufacture.³ After Honeywell refused two such demands, Pillsbury petitioned for writs of mandamus to compel production.⁴ The trial court denied all relief, finding that Pillsbury was interested solely in bringing certain political and social views before the Honeywell management and other shareholders, and therefore had not shown a proper purpose for his request.

1. Petitioner held 343 shares which, at the time of trial, were worth about \$50,000. He had ordered his agent to purchase 100 shares of Honeywell stock and the agent, unaware of petitioner's designs, registered the 100 shares in the name of a Pillsbury family nominee—Quad & Co. Pillsbury subsequently discovered that he had a contingent beneficial interest in 242 shares under the terms of a trust formed by his grandmother. Nonetheless, fearing that he was not a "stockholder of record," he purchased one additional share on his own. *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 324-25, 191 N.W.2d 406, 408-09 (1971).

2. Honeywell is a Delaware corporation doing business and having its main offices in Minnesota.

3. The shareholder's right of inspection is provided by MINN. STAT. §§ 300.26, .32 (1971); the Delaware counterpart is DEL. CODE ANN. tit. 8, § 220 (Supp. 1968). For the text of these statutes see note 7 *infra*. The trial court applied Delaware law, and on appeal both parties strenuously argued the propriety of this application. The supreme court did not reach the issue of applicable state law, stating only that the statutes of each state were declaratory of the same common law test and therefore the trial court's determination was acceptable. *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 326, 191 N.W.2d 406, 409 (1971).

4. Mandamus is the traditional remedy for enforcement of the common law and statutory right of inspection. See, e.g., *State ex rel. Humphrey v. Monida & Yellowstone Stage Co.*, 110 Minn. 193, 124 N.W. 971 (1910); 5 Fletcher Cyc. Corp. § 2251 (Supp. 1967). The evolution of its application is traced in Note, "Proper Purpose" For Inspection of Corporate Stock Ledger, 1970 DUKE L.J. 393, 394-97.

On appeal, the Minnesota Supreme Court affirmed, *holding* that a shareholder's demand for inspection lacks a proper purpose if not motivated by a genuine concern for his economic investment in the corporation.⁵ *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 191 N.W.2d 406 (1971).

The common law or statutory right of a stockholder to inspect the books and records of a corporation derives from his status as an owner of corporate assets and his interest in having information concerning the management and the condition of his property.⁶ However, the stockholder's right is not absolute. To protect the corporation, the right to inspect has been limited by the requirement that the shareholder have a proper purpose for inspection,⁷ usually stated in terms of a proper purpose germane

5. The court disposed of several allegations of procedural error by affirming that (1) the trial court had properly determined the applicable law, note 3 *supra*; (2) respondent in a mandamus action could answer prior to the issuance of an alternative writ; (3) a deposition could be taken before the issuance of an alternative writ and could subsequently be considered by the trial court; and (4) petitioner was not improperly denied a jury trial where the trial court found all questions of fact answered by the pleadings and petitioner's deposition.

6. See, e.g., *Sawers v. American Phenolic Corp.*, 404 Ill. 440, 89 N.E.2d 374 (1950); *State ex rel. G.M. Gustafson Co. v. Crookston Trust Co.*, 222 Minn. 17, 22 N.W.2d 911 (1946); H. BALLANTINE, *CORPORATIONS* §§ 159, 160 (rev. ed. 1946); 5 FLETCHER CYC. CORP. § 2213 (Supp. 1967); 18 AM. JUR. 2d *Corporations* § 180 (1965).

7. See 2 G. HORNSTEIN, *CORPORATION LAW* § 611 (1959); 18 C.J.S. *Corporations* § 502 (1939); Annot., 15 A.L.R.2d 11 (1951). At the turn of the century, judicial limitation of the right to inspection in addition to an increasingly intractable attitude by managements led many legislatures to codify an *absolute* right of shareholder inspection. A brief discussion of these developments and a comprehensive review of such statutes can be found in Newman, *Inspection of Stock Ledgers and Voting Lists*, 16 Sw. L.J. 439 (1962). With increasing corporate size and greater numbers of shareholders, many legislatures relented and enacted the common law limitations as an element of the statutory right. For example, MINN. STAT. § 300.32 (1971) provides in relevant part:

In all stock corporations the directors shall cause accurate and complete records to be kept of all corporate proceedings and of all stock subscribed, transferred, cancelled, or retired and proper books, accounts, files, and records of all other business transactions. All such books and records shall, *at all reasonable times and for all proper purposes*, be open to the inspection of any stockholder . . . (emphasis added).

Similarly DEL. CODE ANN. tit. 8, § 220(b) (Supp. 1968) provides in relevant part:

Any stockholder, in person or by attorney or other agent, shall upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for *any proper purpose* the corporation's stock ledger, a list of its stockholders, and its other books and records, and to make copies or extracts therefrom. A *proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder* . . . (emphasis added).

to his interest as a shareholder.⁸ Generally, a stockholder has a proper purpose if the request to inspect books and records at a reasonable time and place is made in good faith, for a specific purpose, and is not made for a vexatious purpose or to gratify curiosity, nor for an objective inimical to the interests of the corporation itself.⁹ Disclosure is normally compelled in the following instances: where the shareholder seeks to investigate management and determine the financial condition of the corporation,¹⁰ where the purpose is proxy solicitation in opposition to or for ouster of the existing management,¹¹ where the shareholder wants to determine the value of his stock,¹² or where the desire is for communication with other shareholders.¹³ Inspection has also been allowed for aid in litigation against the corporation.¹⁴ Admission to corporate records has usually been denied when the shareholder's purpose is to satisfy idle curiosity,¹⁵ to harass or

8. See cases cited notes 10-14 *infra*.

9. *Sanders v. Pacific Gamble Robinson Co.*, 250 Minn. 265, 267-68, 84 N.W.2d 919, 921-22 (1957). This general statement appears to comport with the definitional pronouncements in other jurisdictions. See 18 C.J.S. *Corporations* § 503 (1939) and cases cited.

10. See, e.g., *Guthrie v. Harkness*, 199 U.S. 148 (1905) (shareholder can determine financial condition of national bank even though defendant directors alleged resultant breach of confidential and trust relation with customers); *Winger v. Richards-Wilcox Mfg. Co.*, 33 Ill. App. 2d 115, 178 N.E.2d 659 (1961) (second requested inspection of executive salaries, bonuses, and expenses allowed three months after first inspection completed); 5 FLETCHER CYC. CORP. § 2223 (Supp. 1967); Annot., 15 A.L.R.2d 11, 30 (1951).

11. See, e.g., *Nationwide Corp. v. Northwestern Nat'l Life Ins. Co.*, 251 Minn. 255, 87 N.W.2d 671 (1958) (not improper to solicit proxies for purpose of attempting to change management); *Morris v. United Piece Dye Works*, 137 N.J.L. 262, 59 A.2d 660 (Sup. Ct. 1948) (submission of proposed plan of reorganization to other stockholders); Annot., 15 A.L.R.2d 11, 77, 80 (1951).

12. See, e.g., *Guthrie v. Harkness*, 199 U.S. 148 (1905); *State ex rel. McClure v. Malleable Iron Range Co.*, 177 Wis. 582, 187 N.W. 646 (1922) (inspection of report made by private accountant hired by the corporation); Annot., 15 A.L.R.2d 11, 42 (1951).

13. See, e.g., *McCormick v. Statler Hotels Del. Corp.*, 55 Ill. App. 2d 21, 203 N.E.2d 697 (1964) (communication with other shareholders "to discuss the company's condition"); *Lake v. Buckeye Steel Casting Co.*, 2 Ohio St. 2d 101, 206 N.E.2d 566 (1965) (communication with other shareholders "regarding the affairs of the corporation" a sufficiently specific purpose).

14. See, e.g., *State ex rel. Floren v. Displayograph Co.*, 135 Minn. 479, 160 N.W. 486 (1916) (inspection by majority shareholder and president to prepare defense to a charge of embezzlement); *State ex rel. Humphrey v. Monida & Yellowstone Stage Co.*, 110 Minn. 193, 124 N.W. 971 (1910); Annot., 15 A.L.R.2d 11, 83 (1951). The shareholder as a litigating party may also avail himself of the discovery machinery in a proper case. FED. R. CRV. P. 34.

15. The disapproval of "conducting a general fishing expedition"

annoy the corporate management,¹⁶ to further a speculative or commercial scheme,¹⁷ or to obtain corporate secrets and aid competitors.¹⁸

Prior to *Pillsbury*, no court had held that a request for inspection lacks the requisite proper purpose absent a desire by the shareholder to protect his investment. The court thus rejected the argument that communication with other shareholders and solicitation of proxies to elect new management are per se proper purposes for inspection. Neither purpose was sufficient, the court reasoned, upon a record which clearly showed that Pillsbury's ultimate goals were wholly non-economic.¹⁹

The weight of authority favored Pillsbury's position that a request for inspection of a shareholder list²⁰ to communicate

is asserted in *News-Journal Corp. v. State*, 136 Fla. 620, 187 So. 271 (1939); 5 FLETCHER CYC. CORP. § 2226.1 (Supp. 1967).

16. See, e.g., *Morgan v. Howard*, 293 F. 650, 54 App. D.C. 3 (1923) (inspection denied because ulterior purpose was to harass and perhaps destroy the corporation); *News-Journal Corp. v. State*, 136 Fla. 620, 187 So. 271 (1939) (40% shareholder, a rival news company, could destroy by inspection).

17. See, e.g., *State ex rel. Theile v. Cities Service Co.*, 1 W.W. Harr. (31 Del.) 514, 114 A. 463 (1922) (access to shareholder lists denied when only purpose was to procure and sell same for profit); *Charles A. Day & Co. v. Booth*, 123 Me. 443, 123 A. 557 (1924) (inspection denied where petitioner, owner of one share in each of three corporations, requested stockholder lists for commercial circularization as he had from 2000 other corporations prior to the instant action); Annot., 15 A.L.R.2d 11, 49, 53 (1951).

18. See, e.g., *State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n*, 200 Minn. 1, 273 N.W. 603 (1937) (those expelled from milk cooperative, of which relator was one, had entered contractual relations with competitors and evinced a desire to abet same); *State ex rel. Paschall v. Scott*, 41 Wash. 2d 71, 247 P.2d 543 (1952) (shareholder's dealings with competitors detrimental to corporation).

19. Pillsbury did assert an economic interest: "This is distasteful morally, and to me it's bad business to become involved in this kind of manufacture." Petitioner's Deposition at 64. He expressed the fear that such manufacture must give "Honeywell a very bad name among the general public." *Id.* at 65. He felt that "more productive" and "more profitable business enterprises" were open to Honeywell. *Id.* at 70. Such market is very "unstable" and therefore "is endangering the investments of its stockholders, even endangering the job security of its workers." *Id.* at 83. Honeywell's policies are "shortsighted" in that "I don't think they understand the depth of my concern and the concerns of other young people, the young people, whom, someday, they might want to hire to help the corporation." *Id.* at 83.

However, the court's interpretation of the facts seems fair. Although Pillsbury did claim to have the economic interests of Honeywell at heart, such claim was likely in the nature of a recital, a mere allegation to bring this request within the proper purpose doctrine.

20. The distinction between shareholder ledgers and other corpo-

with other shareholders regarding plans presented by management, or proposed by the shareholder himself, is motivated by a proper purpose.²¹ When the communication concerns another traditionally proper purpose, proxy solicitation, the shareholder's position is stronger. Thus, in *General Time Corporation v. Talley Industries*,²² the court rejected the company's allegations of improper and illegal purpose in connection with violation of the Securities and Exchange Act. The desire to solicit proxies for a slate of directors in opposition to management was held a proper purpose reasonably related to the stockholder's interest as a stockholder, and "any further or secondary purpose in seeking the list is irrelevant."²³

The Minnesota court cited *McMahon v. Dispatch Printing Co.*²⁴ to support its position that communication with other shareholders is not per se a proper purpose. However, the share-

rate books should be noted. Prior to enactment of DEL. CODE ANN. tit. 8, § 220 (Supp. 1968), the burden of proof on the issue of the propriety of purpose was allocated dependent upon the type of records sought. For examination of shareholder lists, the burden was on the corporation to show an improper purpose. *Insuranshares Corp. v. Kirchmer*, 1 Terry (40 Del.) 105, 5 A.2d 519 (1939). For inspection of other corporate books the burden fell upon the shareholder to prove good faith and proper purpose. *State ex rel. Waldman v. Miller-Wohl Co.*, 3 Terry (42 Del.) 73, 28 A.2d 148 (1942). The statutory language now incorporates this rule. DEL. CODE ANN. tit. 8, § 220(c) (Supp. 1968). The issue of burden of proof was not reached in the *Pillsbury* decision; the trial court had decided that *Pillsbury* was not entitled to relief as a matter of law, solely on the pleadings and *Pillsbury's* deposition. See also text accompanying note 39 *infra*.

21. See, e.g., *Chable v. Nicaragua Canal Co.*, 59 F. 846 (C.C.S.D.N.Y. 1894) (communication to oppose a possible reorganization); *Hanrahan v. Puget Sound Power & Light Co.*, 332 Mass. 586, 126 N.E.2d 499 (1955) (communication about possible merger even though there was no specific merger plan then in existence); See also cases cited in note 13 *supra*; Newman, *supra* note 7, at 452.

22. 43 Del. Ch. 531, 240 A.2d 755 (Sup. Ct. 1968).

23. *General Time Corp. v. Talley Indus., Inc.*, 43 Del. Ch. 531, 533, 240 A.2d 755, 756 (Sup. Ct. 1968). The shareholder in *Nationwide Corp. v. Northwestern Nat'l Life Ins. Co.*, 251 Minn. 255, 87 N.W.2d 671 (1958), was an unregistered investment company which held a controlling interest in two of defendant insurance company's competitors. The Minnesota court held that interest in a rival corporation was not by itself sufficient to deny inspection; it was not improper to solicit proxies for the purpose of attempting to change the management of the corporation and consequently not improper to seek inspection to be able to communicate with, or solicit proxies from, other voting shareholders. It is difficult to perceive why gaining control of, or changing, management is considered proper and not "inimical" to the corporation whereas communication directed at changing policy is not.

24. 101 N.J.L. 470, 129 A. 425 (Sup. Ct. 1925).

holder was denied inspection in *McMahon* because he had the patently improper purpose of politically discrediting the company's president, a state officeholder. This purpose was not only unrelated to the interests of the company and the other shareholders, but also potentially injurious to the credit of the company.²⁵ The court's reliance on *McMahon*, considering the extreme fact situation of that case, appears misplaced. Although it is arguably justifiable, as in *McMahon*, to examine a petition for elements which could defeat a proper purpose,²⁶ there is little reason to make lack of investment interest one of those elements.

The restrictive approach of the Minnesota court in insisting on a concern for an investment interest has been rejected recently in other jurisdictions. Primarily for social and ethical reasons,²⁷ the shareholders in *Medical Committee for Human Rights v. SEC*²⁸ sought to halt the production of napalm and proposed an amendment of the Dow Chemical Company's charter for inclusion in the 1968 proxy statement.²⁹ Dow refused to include the

25. Other courts have also denied access to shareholder lists in cases where the petitioner has failed to specify sufficiently the nature of the communication. In *Northwest Industries, Inc. v. B.F. Goodrich Co.*, 260 A.2d 428 (Del. 1969), the desire to communicate "with reference to a special meeting" was not specific enough to allow a determination of reasonable relation to interest as a shareholder. "If [mere intent to communicate] were the limit of the statutory requirement, any stockholder stating a willingness to pay the expense of a mailing to other stockholders would be entitled to the list, regardless of the nature of the communication." *Id.* at 429. In a laconic dissent, the Chief Justice said that the statutory right was almost absolute and that communication concerning a shareholder meeting already scheduled was reasonably related to interest as a shareholder. See also Note, *supra* note 4, at 402-04. For denial of inspection because shareholder lists were sought only for commercial sale, see cases cited in note 17 *supra*.

26. Because of the discretionary nature of mandamus, courts usually look beyond the alleged facts for determination of proper purpose. See generally Note, *supra* note 4.

27. In the original letter to the Secretary of Dow, the National Chairman of the Committee for Human Rights wrote, "Finally, we wish to note that our objections to the sale of this product [are] primarily based on the concerns for human life inherent in our organization's credo." *Medical Committee for Human Rights v. SEC*, 432 F.2d 659, 662 (D.C. Cir. 1970). There followed a secondary economic objection to the production in that it would jeopardize future recruitment efforts.

28. 432 F.2d 659 (D.C. Cir. 1970), *dismissed as moot*, 404 U.S. 403 (1972). For convenience, this case will herein be referred to as *Dow*.

29. Such shareholder proposals are provided for in the proxy rules of the Securities and Exchange Commission. Management has the right to omit a proposal if it is submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes," 17 C.F.R. § 240.14a-8(c)(2) (Supp. 1972), or if it is "with respect to a matter relating to the conduct of the ordinary business operations of the issuer," 17 C.F.R. § 240.14a-8(c)(5) (Supp. 1972).

proposals and the S.E.C. ruled that it would take no action on that refusal. In reviewing the S.E.C.'s action, the Circuit Court of Appeals for the District of Columbia took the position that a shareholder may properly be concerned with the social and ethical aspects of corporate business.³⁰ Similarly, the S.E.C. more recently compelled General Motors to include in its proxy statement two non-economic shareholder proposals of the "Campaign to Make General Motors Responsible."³¹ The first was an amendment of the bylaws to increase the number of directors by three; the second would have created a "Shareholder's Committee for Corporate Responsibility."³² Thus it should not be assumed that a person concerned with political and social issues prior to becoming a shareholder cannot properly be acting as a shareholder when he subsequently attempts to communicate these concerns. If a shareholder is not exclusively interested in return on investment, a corporate decision founded on profit-maximization will not always be in his interest as a shareholder.³³ Shareholders

30. The court ruled only that such S.E.C. actions were reviewable, but by dictum chastized the S.E.C.'s administration and suggested guidelines for the S.E.C. determination on remand. More important to the instant discussion was the court's consideration of the shareholder's scope of interests in the corporation:

No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present their co-owners . . . the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy.

Medical Committee for Human Rights v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970). For a discussion of the judicial review aspects of the decision see Comment, 57 VA. L. REV. 331 (1971). For a practical look at and criticism of S.E.C. administration see Clusserath, *The Amended Stockholder Proposal Rule; A Decade Later*, 40 NOTRE DAME LAW. 13 (1964).

31. For a comprehensive treatment of the Campaign see Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971).

32. The Committee of fifteen to twenty-five members was to be chosen by a board member of General Motors, a representative of the UAW and a representative of Campaign GM.

33. Nor will a decision founded on profit-maximization always be the corporation's only interest. With early 20th century economic theory propounding the view that corporations sought only the greatest profit, the courts naturally adopted the view as a legal predicate, particularly when it was assumed that the shareholder had only two interests: the return on his capital and the return of his capital. See A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Schulman, *Shareholder Cause Proposals: A Technique to Catch the Conscience of the Corporation*, 40 GEO. WASH. L. REV. 1, 19-32 (1971); Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919). However, it is evident from the change in economic theory that the corporation's sole

have a broad range of interests, and a decision which refuses to recognize this fact implicitly denigrates the shareholder's status as an owner with the inherent right to determine the use of his property.³⁴

There are at least two factors which may explain why the Minnesota court adopted this narrow view of shareholder interests. First, the court suggested that if a less restrictive standard for inspection were established, "the power to inspect [might become] the power to destroy" by permitting thousands of shareholders to "roam at will" through corporate records.³⁵ This argument is of doubtful application since the shareholder lists are

concern is not always profit; the corporation may adhere to a policy of sales or growth maximization. See generally, Schwartz, *supra* note 31, at 462-82; Note, 5 U. MICH. L.J. REF. 68 (1971).

34. The Minnesota court, in a footnote, expressed no disapproval of the *Dow* dictum that economic benefit and community service may simultaneously motivate a stockholder, but held that Pillsbury failed to meet the *Dow* test because he had no investment motivation for his inspection. *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 331, 191 N.W.2d 406, 412 (1971). This focus on motivation serves only to obfuscate the pertinent import of the *Dow* decision, namely, that the purpose of questioning the political and social facets of company policy is a purpose *germane to the shareholder's interest as a shareholder*.

35. *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 328, 191 N.W.2d 406, 410 (1971). For the "roaming at will" proposition, the court quoted from *Cooke v. Outland*, 265 N.C. 601, 611, 144 S.E.2d 835, 842 (1965). In *Cooke*, the quoted lines were merely general prefatory comments to the statement that the right of inspection should not be absolute—simply window-dressing for the recitation of a well-accepted principle. It is interesting also that the *Cooke* court, notwithstanding its recitation of "roaming at will," reversed the trial court and allowed inspection.

The implication of the *Cooke* quote is that corporate size and the number of shareholders have grown to such a degree that perhaps the archaic concept of shareholder inspection is due for revision. The right of inspection arose during a time of small, closely-held corporations when the number of shareholders was small and when it was a reasonable assumption that a shareholder held a substantial interest in the actual management of the company. As corporate size proliferated and corporations went public, the typical shareholder became increasingly remote from the management and its decision-making process as the process itself became almost incomprehensibly complex. To restrict the number of shareholders eligible for inspection and to ensure a bona-fide interest in management, many states have enacted statutes limiting the right of inspection to those who own at least a certain minimum percentage of the outstanding shares of the corporation. See, e.g., ARK. STAT. ANN. § 64-312 (1947); D.C. CODE ANN. § 29-920 (1967); FLA. STAT. ANN. § 608.39 (1969); ILL. REV. STAT. ch. 32, § 157.45 (1967); LA. REV. STAT. § 12.103 (Supp. 1970); MAINE REV. STAT. ANN. tit. 13, § 373 (1964); MICH. COMP. LAWS ANN. § 450.45 (1967); NEV. REV. STAT. § 78.105 (1970); N.J. STAT. ANN. § 14A:5-28 (1969); N.Y. BUS. CORP. LAW § 624 (McKinney 1963); MODEL BUS. CORP. ACT ANN. § 52 (1971).

distinct from the other records and are required by law to be accessible at all reasonable times.³⁶ Had the court made the practical distinction between the difficulty of producing shareholder lists and that of opening other books and records, it could have restricted the scope of its decision, limiting Pillsbury to the inspection of shareholder lists.³⁷ The second factor was Pillsbury's tenuous standing as a shareholder.³⁸ There is an established judicial doctrine that a shareholder cannot maintain a lawsuit through the artifice of merely buying shares of stock in a corporation. It is an implicit factor in inspection cases where the shareholder purchased a few shares solely to gain inspec-

36. See the construction of DEL. CODE ANN. tit. 8, § 219 (Supp. 1968) in *State ex rel. Healy v. Superior Oil Corp.*, 1 Terry (40 Del.) 460, 13 A.2d 453 (1940); MINN. STAT. § 300.26 (1971) (original shareholder ledger). It is arguable that the disruption of normal business caused by such an inspection would not be as severe as feared by the court.

37. There is a legal as well as a practical distinction between shareholder lists and other corporate records. DEL. CODE ANN. tit. 8, § 220(c) (Supp. 1968) provides for a shifting of the burden of proof on the propriety of the purpose. See note 20 *supra*. MINN. STAT. § 300.26 (1971) provides an *absolute* right to inspect the original shareholder ledger whereas MINN. STAT. § 300.32 (1971) provides only the qualified right to inspect other books and records. See note 7 *supra*.

38. On July 3, 1969, Pillsbury attended a meeting of the "Honeywell Project," a group which shared his views in opposition to the Vietnam War. At this meeting he learned of Honeywell's production of anti-personnel fragmentation bombs and decided to try to stop it. He subsequently purchased the shares in Honeywell and requested the inspection. See note 1 *supra*.

We agree with the court in *Chas. A. Day & Co. v. Booth*, 123 Maine 443, 123 A. 557, 558 (1924) that "where it is shown that such stockholding is only colorable, or solely for the purpose of maintaining *proceedings of this kind*, [we] fail to see how the petitioner can be said to be a person interested, entitled as of right to inspect . . ." (emphasis added).

State ex rel. Pillsbury v. Honeywell, Inc., 291 Minn. 322, 329, 191 N.W.2d 406, 411 (1971). The fact situation in *Day* appears inapposite. Petitioner, a dealer in unlisted, inactive and defaulted securities, there sought the shareholder lists of three companies to advertise his business and to trade in the stocks of the three. Such a commercial purpose has been uniformly held improper. Petitioner had bought one share in each of the three companies and had always sold his lone shares immediately upon production of the lists. It is indeed understandable that the *Day* court would have reservations about petitioner's standing.

The Minnesota court footnotes statutes from many states for the proposition that one must have proper standing to request inspection. *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 328, 191 N.W.2d 406, 411 (1971). With some variations, these statutes require that petitioner have been a shareholder of record for at least six months and/or that he own 5% of the outstanding shares. The fact that, while many states have seen fit to so limit the concept of proper standing by statute, Delaware and Minnesota have not done so would seem to contradict the court's implication.

tion.³⁹ This rule is applied, for example, in derivative⁴⁰ and non-derivative⁴¹ actions where the shareholder buys stock *after* he learns of the acts complained of in the suit. However, these usually are actions to recover for damages to shareholder interests and are therefore not entirely apposite to the *Pillsbury* situation. Nevertheless, the Minnesota court might well have been influenced by the doctrines established in these analogous areas of the law. That is, one who buys stock simply to harass the corporation for purely personal, social and political reasons should not be aided by the legal process.⁴²

On one level, the decision seems to dictate scrutiny of future petitions for shareholder inspection to eliminate those with a non-economic purpose. The shareholder who would contest company policy on non-economic grounds would thus be relegated to communication, at his own expense,⁴³ with other known shareholders⁴⁴ or to use of the corporate proxy machinery pursuant to the restrictive regulations of the S.E.C.⁴⁵ However, the decision

39. See, e.g., *Chas. A. Day & Co. v. Booth*, 123 Me. 443, 123 A. 557 (1924); see also note 38 *supra*.

40. See, e.g., *Jepson v. Peterson*, 69 S. Dak. 388, 10 N.W.2d 749 (1943). See W. CARY, *CORPORATIONS* 922 (4th ed. 1969).

41. See, e.g., *Winter v. Southern Sec. Co.*, 155 Ga. 590, 118 S.E. 214 (1923). See also Sykes, *Right of Stockholder to Attack Transactions Occurring Prior to His Acquisition of Stock*, 4 Md. L. Rev. 380 (1940).

42. Much of the flavor of Honeywell's brief appears in the court's opinion. "[Pillsbury is] attempting to change Honeywell's corporate policy through 'institutionalized' means. He evidently preferred to conduct a more civilized form of corporate warfare than some of his contemporaries were waging." Brief of Respondent at 8. "Petitioner did not attempt to determine for himself, by examining published or other financial statements or reports of or about Honeywell, or by consulting others, whether Honeywell stock would be a good investment even for a scion of wealth [who] did not know or care where the money to purchase the Honeywell stock came from." *Id.* at 8. "His only purpose was to work within the 'Establishment' to promote his pacifist or related views of national relevancy and priority by proselytizing Honeywell's other shareholders. . . ." *Id.* at 10. "He is, in fact, proceeding upon a 'domino theory' of his own, a term which is probably anathema to people of his bent when applied to justify the war in Vietnam." *Id.* at 15. "Such a result would permit any extremist or demagogue to transfer his political campaign from the streets and public media to the offices of corporations and the mailboxes of shareholders." *Id.* at 16 (emphasis added).

43. On the prohibitive expense of this course of conduct see Eisenberg, *Access to Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1491-99 (1970); Schwartz, *The Public-Interest Proxy Context: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 426, 493 (1971).

44. Obviously, if the petition to compel inspection of shareholder lists fails, the shareholder will not know who all of the other shareholders are.

45. See Clusserath, *supra* note 30. For practical suggestions to man-

more probably will be limited to its extreme fact situation. Any shareholder seeking inspection of shareholder lists and records, regardless of his reasons, should be able to succeed by alleging a plausible connection between his purpose and the economic future of the corporation.

agement on how best to thwart "shareholder democracy" see Manne, *Shareholder Social Proposals Viewed By An Opponent*, 24 STAN. L. REV. 481 (1972).

Creditors Remedies: Foreign Attachment Held to Meet Due Process Requirements

Plaintiff, a Pennsylvania resident, filed suit in state court against his former employer, a foreign corporation not registered to do business in Pennsylvania, seeking damages for an allegedly invalid discharge from employment. Plaintiff then caused a writ of foreign attachment to issue against the defendant's in-state bank account balances, an amount in excess of \$75,000. Following removal to federal court, the defendant entered a general appearance and moved to quash the attachments on the theory that the absence of notice and hearing violated due process. The United States District Court for the Eastern District of Pennsylvania denied the motion,¹ and the defendant brought an interlocutory appeal. The United States Court of Appeals for the Third Circuit, Seitz, C.J., affirmed the district court ruling, *holding* that foreign attachment used to establish *quasi in rem* jurisdiction does not violate the due process clause of the 14th amendment because the state interest in providing resident plaintiffs a local forum for actions against nonresident debtors outweighs possible hardships for debtors caused by such procedures. *Lebowitz v. Forbes Leasing and Finance Corporation*, 456 F.2d 979 (3d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3168 (U.S. Oct. 10, 1972).

Foreign attachment provides an unpaid creditor with recourse against a nonresident debtor who owns property in the creditor's state. In most jurisdictions a creditor initiates the procedure by filing an affidavit in support of his claim and requesting that a judge or clerk of the court issue a writ ordering the sheriff to seize or impound the debtor's property.² The attached property becomes the basis for *quasi in rem* jurisdiction if the nonresident debtor refuses to appear. The property also provides a fund out of which the creditor may satisfy a judgment if he prevails on the merits. Foreign attachment is a summary procedure in that the nonresident debtor receives neither notice nor hearing before the seizure of his property. This

1. *Lebowitz v. Forbes Leasing and Finance Corporation*, 326 F. Supp. 1335 (E.D. Pa. 1971).

2. See, e.g., CAL. CODE CIV. PROC. § 537(2) (Supp. 1972); D.C. CODE ENCYCL. ANN. § 16-501 *et seq.* (Supp. 1972); MINN. STAT. §§ 570, 571.41 (1971).

remedy, which is available only against nonresidents, should be distinguished from summary general attachment procedures, which are applicable to residents. Fewer than fifteen states provide such general attachment procedures, many of which have been found unconstitutional,³ while all fifty states maintain foreign attachment.⁴

Although most summary creditors' remedies have been found to violate due process under *Sniadach v. Family Finance Corporation of Bay View*,⁵ foreign attachment has survived be-

3. See note 5, *infra*. The Minnesota attachment and garnishment statutes, MINN. STAT. §§ 570, 571.41 (1971), which allow summary seizure of the debtor's property where he is a nonresident, are as vulnerable to such constitutional attack as any foreign attachment statute. In fact, the Minnesota Supreme Court has already held that state's general garnishment statute unconstitutionally violative of due process under *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969). See *Jones Press, Inc. v. Motor Travel Service, Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970).

4. In contrast to the relatively recent development of general attachment, the origin of foreign attachment can be traced back through early colonial statutes to that part of the law merchant known as the custom of London. See *Property Research Financial Corp. v. Superior Court*, 23 Cal. App. 3d 413, 417, 100 Cal. Rptr. 233, 235 (1972). The original purpose of foreign attachment was to gain *quasi in rem* jurisdiction in order to compel the appearance of the defendant.

5. 395 U.S. 337 (1969). In *Sniadach* the United States Supreme Court, in an opinion by Justice Douglas, held that a Wisconsin statute permitting prejudgment wage garnishments without notice and hearing was unconstitutional because it authorized "a taking of property without that procedural due process that is required by the Fourteenth Amendment." The theory propounded in *Sniadach* has been used to strike down creditors remedies in the following cases:

Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972) (innkeepers' lien law); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970) (landlord's levy on tenant's possessions); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970) (claim and delivery); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeepers' lien law); *Desmond v. Hachey*, 315 F. Supp. 328 (D. Me. 1970) (imprisonment of a debtor); *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1970) (confession of judgment); *Arnold v. Knettle*, 10 Ariz. App. 509, 460 P.2d 45 (1969) (garnishment of wages and accounts receivable); *Downs v. Jacobs*, 272 A.2d 706 (Del. Super. Ct. 1970) (seizure by a landlord); *Jones Press, Inc. v. Motor Travel Service, Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970) (garnishment of accounts receivable); *Amanuensis Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (1971) (required prior payment of rent as a condition precedent to a proffered defense); *McConaghley v. City of New York*, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (1969) (seizure by a hospital); *Larson v. Fetherston*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969) (garnishment of checking account). In the words of one commentator: "Within the three year span since *Sniadach* first declared that the opportunity to be heard must be 'meaningful' in fact as well as in theory, there has been a literal decimation of prejudgment attachment statutes." Brown, *A Meaningful Opportunity to be Heard*, 46 ST. JOHN'S L. REV. 25 (1971).

cause of certain dicta in *Sniadach*. In that case, the Court stated that "summary procedure[s] may well meet the requirements of due process in extraordinary situations,"⁶ and in support of this proposition cited *Ownbey v. Morgan*,⁷ a Supreme Court decision involving foreign attachment. Later in the opinion the Court cited the Supreme Court case of *McKay v. McInnes*⁸ and stated that although attachment "does not necessarily satisfy procedural due process in every case,"⁹ it may do so in the case of foreign attachment. The opinion maintained that an attachment which lacks notice and hearing may be justified only in a situation which requires special protection of a state or creditor interest.¹⁰ On this authority, in foreign attachment situations state and creditor interests have been found to outweigh the hardships imposed on the debtors.¹¹ With one exception,¹² the federal and state courts have upheld the constitutionality of foreign attachment procedures against challenges that they violated due process, generally on the ground that the state or creditor interests require special protection.¹³ The *Lebowitz* case is the most recent and highest level decision on this question.

6. 395 U.S. at 339.

7. 256 U.S. 94 (1921).

8. 279 U.S. 820 (1929). *McKay* was a per curiam opinion upholding the constitutionality of Maine's general attachment law against a procedural due process attack on the authority of *Ownbey v. Morgan*, 256 U.S. 94, 109 (1921).

9. 395 U.S. at 340.

10. 395 U.S. at 339.

11. For a discussion of the role of debtor hardship in this balancing test, see Note, *The Demise of Summary Prejudgment Remedies in California*, 23 HASTINGS L.J. 489 (1972); Note, *Attachment and Garnishment—Constitutional Due Process of Law*, 68 MICH. L. REV. 986, 1003-05 (1970); Note, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254, 1266-67 (1970); *California Supreme Court*, 60 CALIF. L. REV. 759, 852-53 (1972).

12. *Mills v. Bartlett*, 265 A.2d 39 (Del. Super. Ct. 1970), *rev'd on other grounds*, *Mills v. Trans Caribbean Airways, Inc.*, 272 A.2d 702 (Del. 1970). The court based its decision primarily on its interpretation of *Sniadach* as prohibiting the garnishment of wages in any situation without notice and hearing, an improper interpretation in light of the Supreme Court decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972).

13. In *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971), the court upheld the foreign attachment of defendant's home. The court in *Tucker v. Burton*, 319 F. Supp. 567 (D.D.C. 1970), held that the debtor-defendants' nonresidence under the District of Columbia's wage garnishment law was an "unusual condition" within the meaning of *Sniadach*. In *Property Research Financial Corp. v. Superior Court*, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972), the court held that a situation requiring special protection to a state or creditor interest is present in foreign attachment of a nonresident defendant's real property, and that therefore, the statute authorizing its use does not violate due proc-

The court in *Lebowitz* found such a state interest in effectuating the settlement of disputes between residents of different states and characterized it as a "compensating governmental interest which supports foreign attachment."¹⁴ The opinion focused on the importance of foreign attachment for obtaining jurisdiction over the nonresident defendant despite the availability of long-arm statutes designed to do the same thing. According to the court, the existence of long-arm statutes did not alleviate the need for attachment prior to a nonresident defendant's general appearance.¹⁵ The court emphasized that without the benefit of foreign attachment the plaintiff may face extended litigation concerning whether the defendant is subject to the long-arm statute, and that the court may ultimately hold that jurisdiction does not, in fact, exist. This situation may substantially prejudice a plaintiff in effectively pursuing his rights against a nonresident defendant. On the basis of this interest and in deference to the Supreme Court decisions in *Ownbey* and *McKay*, the *Lebowitz* court upheld the constitutionality of foreign attachment.

The court expressed some reservations about permitting the attachment to remain in effect after the defendant had made a general appearance. The opinion noted that "typically, after a party whose property has been attached enters a general appearance the compensating governmental interest which supports foreign attachment loses its vitality."¹⁶ Although the *Lebowitz* court felt constrained to uphold the foreign attachment because of the *Ownbey* and *McKay* precedents, it could have interpreted *Sniadach* as requiring the invalidation of foreign attach-

ess of law. In *Robinson v. Loyola Foundation, Inc.*, 236 So. 2d 154 (Fla. Dist. Ct. App. 1970), the court upheld the summary attachment of real property in an action by a landlord against nonresident tenants for damages suffered as a result of tenants' breach of their lease.

14. 456 F.2d at 982. In *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970), the United States Supreme Court identified the government's special interest in summary adjudication. For a discussion of the view that each state has the right to control controversies arising within its borders and provide the protection of state courts to its citizens in their dealings with nonresidents, see *Attachment and Garnishment—Constitutional Due Process of Law*, 68 MICH. L. REV. 986, 1004 & n.83 (1970).

15. But see Smith, *Sniadach and Summary Procedures: The Constitution Comes to the Marketplace*, 5 IND. LEGAL FORUM 300, 317 (1972); Note, *The Demise of Summary Prejudgment Remedies in California*, 23 HASTINGS L.J. 489, 511 (1972); Note, *Attachment and Garnishment—Constitutional Due Process of Law*, 68 MICH. L. REV. 986, 1004 (1970); Note, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254, 1261-62 (1970).

16. 456 F.2d at 982.

ment after the defendant has made a general appearance. In the same paragraph in *Sniadach* in which the court cites the *Ownbey* case approvingly, it goes on to note: "nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable."¹⁷ These sentences following the citation of *Ownbey* in the *Sniadach* opinion have been interpreted by some commentators¹⁸ as restricting the application of summary foreign attachment to those situations in which jurisdiction over the nonresident defendant is unavailable by any other means.¹⁹

The comments of the United States Supreme Court in the recent case of *Fuentes v. Shevin*²⁰ lend credence to this interpretation of the *Sniadach* dictum. In *Fuentes*, the Court held Pennsylvania and Florida statutes authorizing summary seizure under writs of replevin violative of due process of law. As it did in *Sniadach*, the Court in *Fuentes* recognized that there "are 'extraordinary situations' that justify postponing notice and opportunity for a hearing," but noted that "these situations . . . must be truly unusual."²¹ By way of illustration, the Court referred to *Ownbey* in a footnote, noting that it involved "attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest."²² This comment by the *Fuentes* Court emphasizing the necessity of the attachment in *Ownbey* might be interpreted to mean that foreign attachment is constitutionally justifiable only where no alternative means of obtaining jurisdiction exists.²³ By reading this requirement of

17. 395 U.S. at 339.

18. See, e.g., Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 950 (1970); Note, *Garnishment Statutes and Due Process: The Effect of Sniadach v. Family Finance Corporation of Bay View*, 7 HARV. J. LEGIS. 231, 235-36 (1970).

19. In the *Ownbey* case *in personam* jurisdiction was unobtainable, there being no long-arm statutes existing at the time.

20. 407 U.S. 67 (1972).

21. *Id.* at 90.

22. *Id.* at 91 n.23.

23. If this interpretation of the *Fuentes* citation of *Ownbey* is indicative of the Supreme Court's view of foreign attachment, an upheaval in this field is in the offing. However, the sentence may also be interpreted to allow foreign attachment in situations where jurisdiction through the use of long-arm statutes is questionable and attachment of the defendant's in-state property is the only certain means of securing jurisdiction. Foreign attachment would be a necessity in such situations as it would be the only way to prevent the prejudicing of a resident in his dealings with a nonresident. The *Fuentes* reference to *Ownbey* is, of course, only one sentence in a footnote. One idea that may be

necessity into the *Sniadach* opinion, as others have, the *Lebowitz* court could have reached the result it wanted with respect to post-appearance foreign attachment.

Some recent decisions upholding the constitutionality of foreign attachment have focused primarily on the security function of attachment rather than its use to obtain jurisdiction.²⁴ It is argued in these opinions that the nonresident poses a special threat to the creditor because he can so easily move his property out of the state, thereby increasing the creditor's difficulty in satisfying a judgment. The court in one such opinion, *Property Research Financial Corporation v. Superior Court*,²⁵ isolated factors which particularly jeopardize the creditor's interests when the debtor is a nonresident. The court first stated that

a nonresident has contacts and roots outside the state which make it far more likely he will be willing and able to transfer assets outside the state to defeat his creditor's recovery than is true in the case of a resident debtor.²⁶

Then the court pointed out that the element of surprise is vital in summary attachments against nonresidents, the principle being much the same as that involved in allowing summary filing of a *lis pendens* at the commencement of property litigation.

Although the *Lebowitz* majority opinion did not deal with this argument, it has some plausibility. If a nonresident defendant removes his property to another state, the removal may jeopardize the creditor's security interest more seriously than, for example, a resident defendant's sale of in-state property or change of banks. While a creditor's judgment is entitled to full faith and credit in other jurisdictions,²⁷ the judgment can be en-

gleaned from that sentence, however, is that the United States Supreme Court recognizes the same interest in foreign attachment as does the circuit court in *Lebowitz*—gaining *quasi in rem* jurisdiction to compel the appearance of the defendant.

24. The District Court in *Lebowitz*, 326 F. Supp. 1335 (E.D. Pa. 1971), maintained that protection of the creditor's security interest by providing a fund from which to satisfy a judgment is the primary purpose of foreign attachment. The court in *Property Research Financial Corp. v. Superior Court*, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972), upheld a foreign attachment of the defendant's real property and found the creditor's security interest to be the paramount justification for foreign attachment.

25. 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972).

26. *Id.* at 419, 100 Cal. Rptr. at 237.

27. The United States Constitution, art. IV, § 1, states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." For a general dis-

forced only if the creditor is able to locate the debtor's property. It is much more troublesome for a creditor to stay informed as to the whereabouts of the defendant's property when it is in another state, and if the creditor does locate the property, he must expend additional funds in suing on the forum state judgment in the debtor's state.

Judge Gibbons, concurring in *Lebowitz*, rejected such creditor security interests as justifications for foreign attachment. He concluded that foreign attachment should not continue after a nonresident defendant has appeared generally, since such a defendant "is no more or less likely to conceal assets or make fraudulent conveyances than is a local defendant."²⁸ *Sniadach* requires that summary remedies be drawn as narrowly as possible and used only when genuinely necessary.²⁹ If nonresidents pose no special danger after they have made an appearance, continuing attachment is not needed and the statute which permits it is not narrowly drawn as required by *Sniadach*. However, the premise of this argument, that nonresidents pose no special hazard if they appear, surely is a matter on which there can be disagreement.

One possible means of accommodating these divergent views is a procedure authorizing the release of the attachment after the nonresident defendant has made a general appearance,³⁰ unless the plaintiff demonstrates in a hearing that such release could substantially jeopardize any judgment he might subsequently obtain. Such a procedure would seem to be most equitable to both sides. The procedure would provide for the possibility of hardship to the defendant in that, if he were truly pressed, he could make a general appearance, thereby releasing the attachment. At the same time, the procedure would recognize the governmental and creditor interests in obtaining jurisdiction over the debtor through foreign attachment. The creditor would not be substantially prejudiced by the defendant's nonresidence,

cussion of the applicability of the full faith and credit provision, see 47 AM. JUR. 2d *Judgments* § 1216 et seq. (1969).

28. 456 F.2d at 982.

29. See 395 U.S. at 339. Justice Douglas notes that the Wisconsin statute invalidated in *Sniadach* was not narrowly drawn to meet an unusual condition. He thereby implies that such specificity in drafting is a requisite for a constitutional statute. An example of such a narrowly drawn law is the absconding debtor statute existing in most states. The statute usually provides for summary attachment where the creditor offers evidence to show that there is imminent danger that the debtor will attempt to remove the *res* from the state.

30. See *Lebowitz*, 456 F.2d at 982, 982-83 (Gibbons, J., concurring).

since, by the defendant's submission to the forum state's jurisdiction, the plaintiff would be spared the necessity of employing a long-arm statute. The hearing at the option of the creditor would also provide protection for his security interests, which to some courts remains the most important function of foreign attachment. Furthermore, since it would be permitted only after the defendant has made a general appearance and the plaintiff has requested it, a hearing would not substantially increase the courts' caseloads.

In light of the *Sniadach* and *Lebowitz* decisions, the crucial issue is no longer whether foreign attachment is constitutional. Rather, the central question has become whether foreign attachment statutes are narrowly drawn when attachment is continued after the defendant has submitted to personal jurisdiction by entering a general appearance. The *Lebowitz* opinion provides a starting point for judicial and legislative consideration of proper responses to this question. Hopefully, the courts and legislatures will consider procedures similar to those outlined above in order to most equitably and efficiently deal with the specialized circumstances of foreign attachment. Such an *ad hoc* determination concerning whether to maintain post-appearance attachment will be necessary to allow for the exigencies of debtor and creditor interests in each situation.

Environmental Law: Standing to Challenge Federal Agency Action Under National Environmental Protection Act

Plaintiffs, an organization alleging general concern for the environment and several individuals claiming residence in the vicinity of the projects involved, sought a preliminary injunction to halt the construction of two federally assisted urban renewal projects. The action was based on the National Environmental Policy Act of 1969,¹ which requires federal agencies to follow certain procedures designed to compel consideration of the environmental impact of their actions.² The plaintiffs alleged that the Department of Housing and Urban Development failed to make an environmental impact statement for these projects in accordance with the Act.³ Defendants, the Secretary of Housing and Urban Development and others, and intervening defendant, the San Francisco Redevelopment Agency, moved to dismiss the action. The United States District Court for the Northern District of California granted the motion, *holding* that the plaintiffs did not have standing to litigate the issue.⁴ *San Francisco Tomorrow v. Romney*, 342 F. Supp. 77 (N.D. Cal. 1972).

The standing issue in *San Francisco Tomorrow* concerns only standing to obtain judicial review of an agency decision.⁵ The federal law in this area has the reputation of being a "complicated specialty of federal jurisdiction,"⁶ and it "has been called one of 'the most amorphous [concepts] in the entire domain of public law.'"⁷ Although the development of the concept of standing in federal jurisprudence has been long and complex,⁸

1. 42 U.S.C. § 4321 *et seq.* (1970) [hereinafter cited as NEPA].

2. NEPA additionally constitutes a statement of national environmental policy and established the Council on Environmental Quality. 42 U.S.C. §§ 4331, 4342 (1970).

3. 42 U.S.C. § 4332(2)(c) (1970).

4. The court alternatively held that, even if plaintiffs did have standing, a nonretroactive interpretation of NEPA would make it inapplicable to the urban renewal projects in question. The retroactivity of NEPA will not be considered in this Comment, but a discussion of this problem is contained in 7 *LAND & WATER L. REV.* 115 (1972).

5. Although the concept of standing includes much more than simply that necessary to obtain judicial review, this Comment will discuss only this area of standing.

6. *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953).

7. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

8. Volumes have been written concerning the law of standing and

several general requirements can be identified. Any test for determining standing to obtain judicial review must consider the constitutional requirement of "case" or "controversy." Historically, the plaintiff was required to show deprivation of a legally protected right or injury to a special and peculiar personal interest not common to the general public.⁹ A legal right was defined as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."¹⁰

However, requirements for standing have been drastically liberalized in recent years.¹¹ A significantly greater number of plaintiffs since 1968 have "gained" standing as courts began to use the "injury in fact" test exclusively.¹² In *Association of Data Processing Service Organization v. Camp*¹³ and its companion case,¹⁴ the Supreme Court in 1970 discarded a large part of prior law and established a greatly simplified two-part test for determining standing: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."¹⁵ The second question is "whether the interest sought to be protected by the complainant is argua-

its development. Treatment here would thus necessarily be superficial. The following sources provide an excellent starting point for an in-depth review of the law of standing: 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 22 (1958); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 *YALE L.J.* 816 (1969); Davis, *Standing: Taxpayers and Others*, 35 *U. CHI. L. REV.* 601 (1968); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 *U. PA. L. REV.* 1033 (1968); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 65 *HARV. L. REV.* 225 (1961).

9. 2 *AM. JUR. 2d Administrative Law* § 575 (1962) and materials cited therein.

10. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939). The legal interest test was overruled in *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970).

11. As early as 1965, the Second Circuit was prepared to break away from the traditional requirements when it stated that "[t]he 'case' or 'controversy' requirement of Article III, § 2 of the Constitution does not require that an 'aggrieved' or 'adversely affected' party have a personal economic interest." *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 615 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). However, as the court noted later in its opinion, there was sufficient economic interest to justify a grant of standing to the plaintiff. See also Davis, *The Liberalized Law of Standing*, 37 *U. CHI. L. REV.* 450 (1970).

12. Davis, *supra* note 11, at 450-51.

13. 397 U.S. 150 (1970).

14. *Barlow v. Collins*, 397 U.S. 159 (1970).

15. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152 (1970).

bly within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹⁶ Although the first part of this test simplified the law, confusion still surrounds the concept of standing, largely because it is uncertain what precisely is required to satisfy the latter part. *Data Processing* nevertheless significantly advanced the liberalized approach to standing which has enabled environmentalists to gain much wider access to the courts than was previously possible.¹⁷

More recently the Supreme Court indicated its approval of this liberalized trend in *Sierra Club v. Morton*,¹⁸ noting that under the Administrative Procedure Act¹⁹ and statutes containing "aggrieved person" clauses, lower courts have recognized that non-economic injuries are a sufficient basis on which to grant standing²⁰ and that a person no longer must suffer an injury not common to the general public to obtain standing.²¹ Nevertheless, the court there denied standing to the Sierra Club

16. *Id.* at 153.

17. See *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Cape May County Chapter, Inc. v. Macchia*, 329 F. Supp. 504 (D.N.J. 1971); *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 878 (D.D.C. 1971); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970); *Crowther v. Seabourg*, 312 F. Supp. 1205 (D. Colo. 1970); *Citizens Comm. v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970). In all of these cases standing was based primarily on interests that would not have been sufficient under the traditional law of standing.

18. 405 U.S. 727 (1972).

19. 5 U.S.C. § 701 *et seq.* (1970) [hereinafter cited as APA].

20. The Supreme Court illustrated the broadening range of cognizable interests in the following footnote:

See, e.g., *Environmental Defense Fund v. Hardin*, 138 U.S. App. D.C. 391, 395, 428 F.2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 339, 359 F.2d 994, 1005 (interest of television viewers in the programming of a local station licensed by the FCC); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 615-616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); *Reade v. Ewing*, 205 F.2d 630, 631-632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); *Crowther v. Seabourg*, 312 F. Supp. 1205, 1212 (interests in health and safety of persons residing near the site of a proposed atomic blast).

405 U.S. at 738 n.13.

21. 405 U.S. at 727.

to contest Forest Service approval of a skiing development in a national forest,²² stating that "[t]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."²³ Since the Sierra Club is one of the foremost groups striving to protect the wilderness environment, a denial of standing to the group itself assumes added significance. Apparently no conservation group will now be granted standing unless one of its individual members is injured. Yet for an organization like the Sierra Club, this requirement should not prove fatal since, in the usual case, at least one of its thousands of members should be able to allege injury by the agency action.

It is unclear whether or not *San Francisco Tomorrow* was decided under the liberalized law of standing. There were two distinct standing issues which the court failed to consider separately: that of the organization itself and that of its members who sued in their individual capacities. As to the organization, standing arguably was correctly denied under the reasoning of *Sierra Club*.²⁴ The court's analysis of the standing issue with respect to the individual plaintiffs, however, appears not to have taken recent developments in the law of standing into account.²⁵ Thus, although it seems clear that economic injury is no longer a prerequisite to standing, the court premised its denial of standing upon the principle that a "mere non-pecuniary interest in the subject matter of a statute" is legally insufficient,²⁶ and that the

22. It is unclear what result would have obtained had the Sierra Club not been unwilling to allege injury to several of its individual members. Two results would have been possible: (1) dismissal as to the Club itself for lack of standing but not as to the injured members suing in their individual capacities; or (2) standing granted to the Sierra Club as representative of its individually injured members. The argument that an organization should have standing to represent its members who have been injured individually (as, for example, by agency approval of a dam on a river which would flood the hunting area of a member) has been rejected by at least one court. See *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.), cert. denied, 402 U.S. 908 (1971). However, the issue has not been conclusively determined.

23. 405 U.S. at 734-35. Cf. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971).

24. Although *Sierra Club* would appear to be dispositive of this issue (but see note 22 *supra*), the court cited but did not discuss that case. Rather, the court did not engage in analysis of prior standing cases, apparently on the principle that such cases either are irreconcilable or so unique as to be irrelevant in deciding new cases with differing fact situations. 342 F. Supp. at 80.

25. See text accompanying notes 15-21 *supra*.

26. 342 F. Supp. at 81.

injury must not be common to the general public.²⁷ An analysis, and treatment of organizational and individual standing as discrete issues might well have led the court to a different conclusion.²⁸

It can be persuasively argued that standing should have been granted to the plaintiffs who alleged specific, individual injury. As other courts have held,²⁹ the application of the *Data Processing*³⁰ test in conjunction with the Administrative Procedure Act (APA)³¹ would have satisfied standing requirements. First, the APA provides that

[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.³²

This right to review is unqualified unless the "relevant statute" (in this case, NEPA) specifically excludes such review or commits the decision to agency discretion,³³ neither of which applies to NEPA. Second, *Data Processing* held that "injury in fact" was sufficient to satisfy the "adversely affected" language of the APA.³⁴ The individual plaintiffs' allegation of concern for their welfare as it might be affected by the nearby housing projects would seem sufficient to satisfy the emerging "injury in fact"

27. The court pointed out that the plaintiffs claimed "no property or other legal interests in the projects or properties included therein or adjacent thereto any greater than or different from that possessed by the citizenry at large." 342 F. Supp. at 79. The court also observed that "it appears that in each case where standing has been recognized, the plaintiff has borne some special relationship to the statute or to its subject matter, or to its enforcement, which distinguishes him from the common body of citizens." *Id.* at 80.

28. The dismissal as to the individual plaintiffs for lack of standing seems particularly surprising in light of a recent decision by the Ninth Circuit, the circuit in which the *San Francisco Tomorrow* court sits. In *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971), standing was denied to the conservation group but granted to individual members residing near a proposed land exchange who alleged

"destruction of fisheries and wildlife from which plaintiffs personally benefit" and [destruction of] the flushing characteristics of the bay affecting the climate around them.

Id. at 1091.

29. See, e.g., *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

30. See text accompanying notes 13-17 *supra*.

31. 5 U.S.C. § 701 *et seq.* (1970).

32. 5 U.S.C. § 702 (1970).

33. 5 U.S.C. § 701(a) (1970).

34. See text accompanying notes 13-17 *supra*.

test.³⁵ Finally, it would seem that the second part of the *Data Processing* test, concerning the "zone of interests" to be protected by the "relevant statute,"³⁶ arguably is met in this case.³⁷ Thus it would appear that, at a minimum, the individual plaintiffs should have been granted standing to contest HUD's failure to make an environmental impact statement.

The *San Francisco Tomorrow* court did not accept the view that protection of the public interest requires judicial review of agency decisions³⁸ and mandates application of the liberalized rules of standing in the area of environmental protection. Environmental protection suits are different from many civil suits because their major purpose is to protect the public interest rather than to obtain a private remedy. The individuals and groups which bring environmental actions are not motivated by hope of financial gain or fear of economic loss. They are interested in protecting the earth's natural resources, nature's beauty and the entire "ecosphere."³⁹ The "case" or "controversy" requirement for environmental actions thus should not be analyzed in the same manner as private actions. The concreteness of the environmental action cannot be discovered in terms of monetary injury, but rather in the fact that the individual or group has expended the great amount of time and money necessary to challenge an administrative action.⁴⁰

The traditional principle that a widely suffered injury is not sufficient to provide standing is also inappropriate in an environ-

35. See note 20 *supra*.

36. See text accompanying note 16 *supra*.

37. See text following note 49 *infra*.

38. At one point the court stated that the Constitution makes it the President's responsibility to execute the laws, and that the President appointed the defendants (Secretary of HUD, *et al.*) to assist him, not the plaintiffs. The court did not suggest what recourse is available to an aggrieved person should the President or his assistants fail to properly execute the laws and protect the public interest. 342 F. Supp. at 81.

39. Here, several billion years ago, life appeared and was nourished by the earth's substance. As it grew, life evolved, its old forms transforming the earth's skin and new ones adapting to these changes. Living things multiplied in number, variety, and habitat until they formed a global network, becoming deftly enmeshed in the surroundings they had themselves created. This is the *ecosphere*, the home that life has built for itself on the planet's outer surface.

Any living thing that hopes to live on the earth must fit into the *ecosphere* or perish.

B. COMMONER, *THE CLOSING CIRCLE* 11 (1971).

40. At least one court has recognized this fact. See *Citizens' Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 103 (2d Cir. 1970).

mental action. No injury to the environment is peculiar to an individual or a small group of people, because such injury inevitably affects the entire ecosphere and, therefore, all individuals. Since the application of this traditional principle would often preclude any effective remedy for acts causing damage to the environment, it should be discarded.

In enacting NEPA, Congress recognized both the need to protect the environment⁴¹ and the desirability of involving parties representing all points of view at every stage of the planning.⁴² Congress thus indicated that every individual should be responsible for protecting the environment.⁴³ President Nixon also has recognized the need for involving the knowledge and expertise of the public in these decisions by ordering

the heads of Federal agencies [to] . . . [d]evelop procedures to ensure the fullest practicable provisions of timely public information and understanding of Federal plans and programs with environmental impact, in order to obtain the views of interested parties.⁴⁴

NEPA, its legislative history, and the executive orders issued concerning its implementation leave no doubt but that it is a fundamental policy objective to involve the public in the plan-

41. The Senate section by section analysis states:

This subsection asserts congressional recognition of each person's fundamental and inalienable right to a healthful environment. It is apparent that the guarantee of the continued enjoyment of any individual right is dependent upon individual health and safety. It is further apparent that deprivation of an individual's right to a healthful environment will result in the degradation or elimination of all his rights.

115 CONG. REC. 29085 (1969).

42. Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities. Using an interdisciplinary approach that brought together the skills of the landscape architect, the engineer, the ecologist, the economist, and other relevant disciplines would result in better planning and better projects. Too often the planning is the exclusive province of the engineer and cost analyst.

Id. (Section by section analysis of NEPA).

43. 42 U.S.C. § 4331(c) (1970), and the Senate section by section analysis which states:

The subsection also asserts congressional recognition of each individual's responsibility to contribute to the preservation and enhancement of the environment. The enjoyment of individual rights requires respect and protection of the rights of others. The cumulative influence of each individual upon the environment is of such great significance that every effort to preserve environmental quality must depend upon the strong support and participation of the public.

115 CONG. REC. 29085 (1969).

44. Exec. Order No. 11,514, 3 C.F.R. 104, 105 (1970).

ning process of federal projects to ensure that the environmental impact is considered.

When an administrative agency threatens injury to the environment, groups such as the Sierra Club and the Environmental Defense Fund and concerned individuals should be allowed to intervene at the agency level and, if necessary, obtain review in the courts.⁴⁵ It has been argued that the agencies, rather than concerned groups and individuals, are charged with protecting the public interest. Unfortunately, agency decisions are not always based upon what is best for the public. Thus one of the factors contributing to the liberalization of the rules of standing

is the increasing awareness that administrative agencies, both executive and independent, do not necessarily operate in the public interest. This is especially true as agencies grow older and stagnate in an adopted point of view handed down through the years. Agency stagnation is inevitably accompanied or caused by insulation from the totality of pressures which lead to decisions in the public interest, leaving only the "special interest groups" to be heeded.⁴⁶

Various factors may enable special interest groups to obtain agency decisions inimical to either the mandates of Congress or the public interest.⁴⁷ In this situation, the courts may realistically be the only forum capable of providing a timely remedy. Failure to allow concerned groups and individuals to intervene at the agency level or obtain judicial review of agency decisions will not only increase "the general feeling of the body politic of exclusion and alienation from government,"⁴⁸ but also allow agencies to completely ignore NEPA. Without the assistance of concerned groups and individuals, Congress might in some instances find it difficult to protect the environment.⁴⁹

If the congressional policy of involvement of environmentalists is to be implemented, the requirements for standing must be

45. This is the thesis of this Comment notwithstanding *Sierra Club's* denial of standing to the organization absent injury to specific members. See text accompanying notes 18-23 *supra*.

46. Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 230, 245-46 (1970).

47. See, e.g., Shannon, 'Like it or not,' *It's the Way the System Works*, *Minneapolis Tribune*, Sept. 18, 1972, at 8A, col. 1.

48. Hanks & Hanks, *supra* note 46, at 246.

49. One of the most potent weapons in marshalling public opinion and challenging governmental agency and industrial pollution has been legal action by conservation groups throughout the United States.

Choulos, *Go Back—You Forgot to Say "May I!" or Standing in Environmental Litigation*, 6 *LINCOLN L. REV.* 127 (1971).

revised. Of primary importance is the elimination of the second part of the *Data Processing* test concerning "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."⁵⁰ This part of the test has been criticized as

(1) analytically faulty, (2) contrary to much case law the Court should not have intended to overrule, (3) cumbersome, inconvenient, and artificial, and (4) at variance with the dominant intent behind the Administrative Procedure Act.⁵¹

Also, this part more properly goes to the issue of reviewability than to standing.⁵² Courts should be able to decide the issue of standing without going to the statutory interpretation issue, which must again be faced in deciding the question of reviewability. As Justice Brennan has persuasively argued,

in making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly written decisions, which may well deny justice in this complex field. When agency action is challenged, standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such.⁵³

The elimination of this part of the current test would thus greatly simplify and clarify the law of standing to obtain judicial review.

By contrast, exclusive use of the "injury in fact" test would be well-considered. In addition to fulfilling the constitutional requirement of "case" or "controversy" there are several other reasons for retention of the injury in fact test:

The strongest reason is the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy. The second reason is that the artificiality and complexity of the law of standing would disappear if the courts would follow the simple idea that one who is in fact hurt may challenge; the large amount of litigation over the unnecessary complexities of the law of standing is wasteful. The third reason, applicable in the federal system, lies in the intent behind the Administrative Procedure Act.⁵⁴

The recent trend toward a more liberal interpretation of

50. 397 U.S. at 153.

51. Davis, *supra* note 11, at 457-58.

52. See, e.g., Barlow v. Collins, 397 U.S. 159, 169 (1970) (concurring opinion), and Phillips, *Environmentalists' Suits—Are They Standing or Falling?*, 4 NATURAL RESOURCES LAWYER 469 (1971).

53. Barlow v. Collins, 397 U.S. 159, 170 (1970) (concurring opinion).

54. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02, at 211 (1958).

standing will probably continue until the Supreme Court has adopted the "injury in fact" test as the sole basis for determining standing to obtain judicial review of agency actions. Justices Brennan and White have already strenuously argued for this position.⁵⁵ Several arguments have been made against having "injury in fact" as the sole test but none of these stands up under direct scrutiny. The law of standing is not the proper concept to ensure that courts refrain from hearing nonjusticiable controversies, that the issues are properly framed, or that the case is competently presented. Other more direct and efficient concepts exist to assist the courts in these areas.⁵⁶ The objection has also been raised that making "injury in fact" the sole test will flood court dockets. This result is highly doubtful considering the large amount of time and money necessary to bring an environmental action. Additionally, simplification of the law of standing would virtually eliminate the large amount of time now consumed by litigating that issue. This should more than offset difficulties caused by any increase in the number of suits. Since the arguments against further simplification and liberalization of the law of standing are unpersuasive, the Supreme Court should establish "injury in fact" as the exclusive test for determining standing to obtain judicial review.*

55. *Barlow v. Collins*, 397 U.S. 159, 170 (1970) (concurring opinion).

56. *Davis*, *supra* note 11, at 468-71.

* While this comment was at press, the Ninth Circuit Court of Appeals handed down its decision in *San Francisco Tomorrow v. Romney*, No. 72-1969 (9th Cir., Jan. 18, 1973).

Constitutional Law: Fourth Amendment: Marijuana
Seized in "Pat-Down" Incident to Traffic Violation
Inadmissible in Subsequent Criminal Prosecution

In September 1968, two St. Paul policemen observed the driver of a car with defective taillights fail to signal for a right turn. They immediately curbed the vehicle. As the driver got out of his automobile to approach the squad car, he took an object (later discovered to be a loaded pistol) from his pocket or belt and threw it on the front seat of his car. The officers had also emerged from their car and, although neither expressed concern for his personal safety, one policeman began a "pat-down" search of the driver before putting him in the squad car to check his driver's license. The officer, in feeling the outside of the driver's pockets,¹ detected an object which did not feel like a gun or knife. As he reached into the pocket, the driver seized² a package from it and dumped part of the contents (later identified to be marijuana) inside the squad car and on the ground. Defendant was arrested for possession of marijuana in violation of *Minn. Stat.* § 618.02. The trial court denied defendant's motion to suppress the marijuana evidence, holding the search valid as incident to the arrest. On appeal, the Minnesota Supreme Court reversed, holding that the search was invalid at its inception and that the marijuana evidence accordingly should have been suppressed. *State v. Curtis*, 290 Minn. 429, 190 N.W.2d 631 (1971).

The fourth amendment to the United States Constitution prohibits unreasonable searches and seizures.³ Searches con-

1. Although the court stated "Officer Patsy testified that he felt the outside of defendant's pockets," *State v. Curtis*, 290 Minn. 429, 430, 190 N.W.2d 631, 632 (1971), Officer Patsy in fact testified that he reached immediately inside defendant's pockets (record at 9, 31, 55, 59, 84), which he does "as a matter of course" (record at 28) upon placing a person in the squad car.

2. The court's statement that "defendant seized a package," *State v. Curtis*, 290 Minn. 429, 430, 190 N.W.2d 631, 632 (1971), is a statement of the facts clearly in the light most favorable to the party prevailing at the trial level. Officer Patsy's testimony that defendant removed the package was contradicted by defendant and three times by the other arresting officer, both of whom testified that it was Officer Patsy who removed the package.

3. The fourth amendment provides:

The right of the people to be secure in their persons, houses, pa-

ducted without a warrant are inherently unreasonable, subject to certain exceptions.⁴ Two such exceptions are searches conducted "incidental to arrest," and searches conducted under the

pers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The exceptions include: Consensual searches, *Amos v. United States*, 255 U.S. 313 (1921); *United States v. Page*, 302 F.2d 81 (9th Cir. 1962); *United States v. Sclafani*, 265 F.2d 408 (2d Cir. 1959), *cert. denied*, 360 U.S. 918 (1959); searches made in "hot pursuit" of a suspect, *Warden v. Hayden*, 387 U.S. 294 (1967); searches of automobiles to prevent loss of evidence, *Carroll v. United States*, 267 U.S. 132 (1925) (allowing search "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* at 153); and searches incident to arrest, *Chimel v. California*, 395 U.S. 752 (1969); *Beck v. Ohio*, 379 U.S. 89 (1964); *Harris v. United States*, 331 U.S. 145 (1947); *Agnello v. United States*, 269 U.S. 20 (1925).

The dissent in *Curtis* attempted to apply the automobile search exception as well. Noting a number of not completely reconcilable United States Supreme Court cases, Justice Kelly, in a dissent in which Justice Odden concurred, attempted to "glean from the language of [such] cases . . . what the thinking of that court may be on a similar case." 290 Minn. at 441, 190 N.W.2d at 638. The validity of such guesswork is questionable, since the Supreme Court has stated explicitly that it has avoided answering the question of "[w]hether or not a car may constitutionally be searched incidental to arrest for a traffic offense." *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968). Moreover, the cases cited present significantly different factual settings from *Curtis*. Following arrests for narcotics, *Cooper v. California*, 386 U.S. 58 (1967), robbery, *Harris v. United States*, 390 U.S. 234 (1968), vagrancy, *Preston v. United States*, 376 U.S. 364 (1964), and reckless driving, *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), defendants in the cases cited were taken into actual physical custody, and the courts' opinions focus on subsequent searches of their cars.

Furthermore, the reasoning of the dissenters seems to be that a valid search of the auto inferentially justifies search of the driver. Such logic overlooks the possibility that the theory upon which a car search is based may be different from that upon which search of the driver is based. For example, the dissenters rely in part on *Chambers v. Maroney*, 399 U.S. 42 (1970), where the Supreme Court upheld a car search conducted under the *Carroll* rule, which allows search of a mobile vehicle when there is "[p]robable cause for believing that the automobile which he stops and seizes has contraband . . . therein" *Carroll v. United States*, 267 U.S. at 156 (1925) (*see supra*). The Court has stated explicitly, however, that even with probable cause, "[w]e see no ground for expanding the ruling in the *Carroll* case to justify [a search of the occupants of a car] as incident to the search of a car." *United States v. Di Re*, 332 U.S. 581, 587 (1948). *See also* L. TRIFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 173 (1967); Lecture by John B. Hotis, FBI National Academy Sectional Retraining Session, July 1, 1970, in FBI LAW ENFORCEMENT BULLETIN 9 (1971).

doctrine of "stop and frisk." Strict limitations circumscribe the incidental search exception. First, only a valid arrest will support an incidental search;⁵ thus, a search is illegal, regardless of what is thereby discovered,⁶ if the arrest is a mere pretext for the search⁷ or if no arrest is made at all.⁸ Second, incidental searches must be reasonable in scope.⁹ Finally, they must be reasonable with regard to the objects sought.¹⁰ "Reasonable objects" have been held to include only fruits of the crime, instrumentalities used to commit the crime, weapons, contraband and evidence.¹¹ Similarly, the doctrine of stop and frisk also is carefully limited in basis and scope. Thus, an officer may conduct a cursory pat-down for weapons only when there is (1) a reasonable factual basis for believing that the person stopped is about to commit or has committed a crime, and (2) fear for the officer's safety caused by a reasonable suspicion that the person is armed and dangerous.¹²

The extent to which either search-incident doctrine or the law of stop and frisk will support searches of traffic violators is a controversial question. The courts have divided on two issues: (1) the circumstances, beyond the mere fact of a traffic arrest, which are necessary to justify such searches; and (2) the proper scope of such a search when sufficient justification exists. The minority rule considers a traffic arrest in itself sufficient justification for either a full search of the violator¹³ or a

5. *E.g.*, *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959); *Giordenello v. United States*, 357 U.S. 480 (1958); *Ortiz v. United States*, 317 F.2d 277 (5th Cir. 1963).

6. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959); *Pigg v. United States*, 337 F.2d 302 (8th Cir. 1964).

7. *E.g.*, *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968); *Fields v. State*, 463 P.2d 1000 (Okla. Crim. App. 1970); *Huebner v. State*, 33 Wis. 2d 505, 147 N.W.2d 646 (1967).

8. *Sibron v. New York*, 392 U.S. 40 (1968).

9. *Chimel v. California*, 395 U.S. 752 (1969) (search is limited to arrestee's person and areas within immediate reach or control).

10. *E.g.*, *Chimel v. California*, 395 U.S. 752 (1969); *Weeks v. United States*, 232 U.S. 383 (1914).

11. *Warden v. Hayden*, 387 U.S. 294 (1967); *Preston v. United States*, 376 U.S. 364 (1964); *Abel v. United States*, 362 U.S. 217, 238 (1960); *Harris v. United States*, 331 U.S. 145 (1947); *Agnello v. United States*, 269 U.S. 20, 30 (1925).

12. *Terry v. Ohio*, 392 U.S. 1 (1968). See R. OLIPHANT, 42 MINNESOTA PRACTICE MANUAL (Criminal Procedure) § 2.9 at 29 (1970).

13. See, *e.g.*, *Neely v. State*, 240 Ind. 362, 164 N.E.2d 110 (1960); *Watts v. State*, 196 So. 2d 79 (Miss. 1967); *Adair v. State*, 427 S.W.2d 67 (Tex. Crim. App. 1968); *Lane v. State*, 424 S.W.2d 925 (Tex. Crim. App.), *cert. denied*, 392 U.S. 929 (1967).

frisk.¹⁴ However, the majority rule requires some additional factual showing beyond the traffic arrest itself to justify either a full search or a frisk.¹⁵

Courts following the majority rule differ as to the additional facts necessary to justify searches of traffic violators. Disparate results have been reached on apparently indistinguishable fact situations.¹⁶ Although the decisions contain language characteristic both of the stop and frisk and search-incident doctrines, many of them have focused on the same elements: the gravity of the offense, the behavior of the driver and passengers, the crime rate in the area of arrest, the time of day and the number of officers present in relation to the number of passengers. Thus the divergent results in such cases may be explicable more in terms of evidentiary determinations rather than any inconsistency in legal theory.

Curtis places Minnesota among the majority of jurisdictions which requires something more than a mere traffic stop to sup-

14. The indignity of a frisk, such courts maintain, is outweighed by the interest of protecting the arresting officer. *E.g.*, *Durham v. Haynes*, 258 F. Supp. 452 (E.D. Mo. 1966); *People v. Weitzer*, 269 Cal. App. 2d 274, 75 Cal. Rptr. 318 (1969); *People v. Graves*, 263 Cal. App. 2d 719, 70 Cal. Rptr. 509 (1968); *State v. Coles*, 20 Ohio Misc. 12, 48 Ohio Op. 2d 309, 249 N.E.2d 553 (1969).

15. See note 16 *infra*.

16. Compare *People v. Clayton*, 13 Cal. App. 3d 335, 91 Cal. Rptr. 494 (1970) (defendant, stopped for defective stoplight, flapped his arms during the stop); *People v. Hubbard*, 9 Cal. App. 3d 827, 88 Cal. Rptr. 411 (1970) (three occupants of a car, stopped for running a stop sign, got out and confronted the officers); *Roybal v. People*, 166 Cal. 541, 444 P.2d 875 (1968) (defendant stopped for defective taillights, passenger leaned forward out of view of officer); *People v. Hollman*, 46 Ill. 2d 311, 236 N.E.2d 7 (1970) (defendant, stopped for failing to signal a turn, could not locate driver's license and "backed away" from the officers); *State v. Campbell*, 53 N.J. 230, 250 A.2d 1 (1969) (driver of a car with one headlight could produce no driver's license or registration permit and gave an unsatisfactory explanation of car's ownership); and *People v. Smith*, 308 N.Y.S.2d 909 (1970) (speeder, driving an unregistered vehicle, presented a forged operator's license), in which searches were upheld, with *People v. Kiefer*, 91 Cal. Rptr. 729, 3 Cal. 3d 807, 478 P.2d 449 (1970) ("furtive gesture" made toward the floor after arrest for speeding); *People v. Reed*, 37 Ill. 2d 91, 227 N.E.2d 69 (1967) (driver of car with missing license plate exhibited nervous behavior); *People v. Peck*, 31 Mich. App. 667, 188 N.W.2d 28 (1971) (driver, stopped for speeding, placed object in seat console); *Thompson v. State*, 487 P.2d 737 (Okla. Crim. App. 1971) (passenger in car with defective taillights made "suspicious movements"); and *Commonwealth v. Dussell*, 439 Pa. 392, 266 A.2d 659 (1970) (defendant ran red light, could produce no registration card, and stated that use of the auto was with the permission of a person he had met in restaurant), where searches were invalidated.

port the search of the driver. Dicta in previous cases¹⁷ were elevated to a rule of law: absent such circumstances as would reasonably cause police officers to fear for their safety, searches of traffic violators are impermissible.¹⁸ However, the precise logic by which the court reached this conclusion is unclear. The *Curtis* opinion, like many others on the subject, may be analyzed in terms either of search-incident doctrine or the law of stop and frisk.

First, the court arguably might have held the search in *Curtis* impermissible under search-incident doctrine. The court cited two leading cases with apparent approval, *People v. Marsh*¹⁹ and *Amador-Gonzales v. United States*,²⁰ which specify the permissible objects of a search incident to arrest:

(1) the fruits of the crime; (2) instrumentalities used to commit the crime; (3) weapons or like material which put the arresting officer in danger or might facilitate escape; (4) contraband, the possession of which is a crime . . . and . . . (5) material which constitutes evidence that the person arrested has committed it.²¹

17. "Police officers may not ordinarily make searches upon apprehending motorists for simple traffic violations upon the slightest hint of illegality." *State v. Harris*, 265 Minn. 260, 268, 121 N.W.2d 327, 333 (1963) (dictum). Officers "had no authority to search defendant's car . . . as an incident to an arrest for changing lanes without signaling" *State v. Clifford*, 273 Minn. 249, 254, 141 N.W.2d 124, 127 (1966) (dictum).

18. The apprehending officer has the "burden of proving probable cause for conducting the search of defendant's person in all but the most serious traffic violations." *State v. Curtis*, 290 Minn. 429, 437, 190 N.W.2d 631, 636 (1971). Examples of what may constitute probable cause cited in *Curtis* are:

circumstances where (a) a motorist is known by the police to be habitually armed or to have a record of assaultive behavior, or (b) he assumes a hostile or threatening attitude when stopped, or (c) the police, after stopping him, by cursory examination and without search have valid reason to believe the motorist is engaged in the commission of a more serious crime.

Id. at 437, 190 N.W.2d at 636. See also text accompanying note 40 *infra*.

The court appears to suggest that sufficient justification for a search also might follow from a valid reason for requiring defendant to enter the squad car. The court states that it was

not to be understood as holding that the police have no right, for their own protection, to search a person before placing him in a squad car if there is a valid reason for requiring him to enter the vehicle and it is not merely an excuse for an otherwise improper search.

Id. This language could be construed as indicating that a valid reason for placing defendant in the car will in itself support a search.

19. 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967).

20. 391 F.2d 308 (5th Cir. 1968).

21. *Id.* at 314. These have been held proper objects of a search incident to arrest by the United States Supreme Court. See note 11 *supra*.

Since none of the permissible objects related to a traffic offense, these two cases therefore concluded that the incident-to-arrest rule could not support a search of a traffic violator.²²

It appears inescapable, however, that one of the permissible objects—weapons—potentially may be involved in a traffic arrest; the traffic violator may be armed. Thus, if the court held the search impermissible under search-incident theory, it must have created an exception to the rule that a search for weapons is permissible. That is, weapon searches are permissible when incidental to any arrest other than a traffic arrest absent additional facts which justify a search in the traffic context. However, since the essence of search-incident doctrine is that an arrest in itself provides sufficient grounds to support a search,²³ it seems conceptually more sound to view the court as having placed the problem beyond the ambit of traditional search-incident doctrine.

On the other hand, an additional factual showing is central to the law of stop and frisk. Under this doctrine, the additional factual showing which justifies a frisk is that

the police officer be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.²⁴

22. Moreover, it might be persuasively argued that because the suspect is detained only momentarily, a traffic stop does not fit neatly into the tight contours of "arrest," and that the traditional law of arrest should not be fully applicable to the stopping of a motorist. Various courts have held, for example, that the *Miranda* warning need not be given traffic violators. See *State v. Tellez*, 6 Ariz. App. 251, 431 P.2d 691 (1967); *State v. Smith*, 181 Neb. 846, 152 N.W.2d 16 (1967); *State v. Zucconi*, 93 N.J. Super. 380, 226 A.2d 16 (1967); The *Curtis* court did not question whether a traffic stop constitutes a true arrest as contemplated by search-incident doctrine, but there is authority that a stop to issue a citation, ticket or other notice to appear in court does not constitute an arrest. See, e.g., *Barrier v. Alexander*, 100 Cal. App. 2d 497, 224 P.2d 436 (1950); *Conn v. Commonwealth*, 387 S.W.2d 285 (Ky. Crim. App. 1965); *State v. Murray*, 106 N.H. 71, 205 A.2d 29 (1964); *Jones v. State*, 8 Misc. 2d 140, 167 N.Y.S.2d 536 (1957); *City of Toledo v. Lowenberg*, 99 Ohio App. 165, 131 N.E.2d 682 (1955). However, other courts have held that the restraint on the traffic violator's freedom of movement which occurs when he is pulled over by the police does amount to an arrest. See, e.g., *Henry v. United States*, 361 U.S. 98 (1959); *United States v. Davis*, 265 F. Supp. 358 (W.D. Pa. 1967); *United States v. Washington*, 249 F. Supp. 40 (D.D.C. 1965); Cf. *United States v. Souther*, 211 F. Supp. 848 (E.D. Tenn. 1962). See also *MINN. STAT. § 629.32* (1969): "An arrest is made by the actual restraint of the person of the defendant or by his submission to the custody of the officer"

23. See note 4 *supra*.

24. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Moreover, several portions of the *Curtis* opinion suggest that the court relied on stop and frisk law to invalidate the search. The two seminal stop and frisk cases, *Terry v. Ohio*²⁵ and *Sibron v. New York*,²⁶ are cited with approval.²⁷ The court's requirement that the policeman have concern for his personal safety is strikingly similar to the requirement of the Supreme Court in *Terry* that the officer observe "unusual conduct which leads him to believe in light of his experience . . . that the person with whom he is dealing is armed and presently dangerous."²⁸ The examples presented by the court²⁹ to demonstrate situations in which a search of a traffic violator would be valid stress the court's concern for the safety of the arresting officer and thus further bolster the view of *Curtis* as a stop-and-frisk case.³⁰

Since the search in *Curtis* was declared invalid at its inception, an important issue was never reached: the permissible scope of an initially justifiable search. The legal theory upon which the decision was based assumes greater significance here. If the court applied search-incident doctrine, the scope arguably is the same as that of any incidental search. If the doctrine of stop-and-frisk was employed, however, then the permissible scope is only that allowed under *Terry*. It is difficult to conceive how search-incident doctrine could be reinstated for scope purposes since the underpinnings of that doctrine were removed in *Curtis* by the requirement of an additional factual showing. Moreover, the extensive reliance on stop-and-frisk principles in the determination of initial justification for the search in *Curtis* indicates that the scope question also should be resolved under stop-and-frisk law. Consequently, the permissible scope for weapon searches of traffic violators should be restricted to "a

25. 392 U.S. 1 (1968).

26. 392 U.S. 40 (1968).

27. *State v. Curtis*, 290 Minn. 429, 432, 190 N.W.2d 631, 633 (1971).

28. 392 U.S. at 30.

29. See note 18 *supra*. As to example (c) in note 18, "evidence of a more serious crime" would remove the fact situation from that of the routine traffic offense. The example illustrates what Chief Justice Warren referred to in *Terry* as the "need of an escalating set of flexible responses, graduated in relation to the amount of information [the officers] possess." 392 U.S. at 10.

30. The *Curtis* fact situation might well have justified a frisk under a *Terry* standard, except for the fact that both officers specifically testified they felt no fear for their personal safety. The dissenters in *Curtis* fault the majority for failing to adopt "an objective standard similar to the one proposed in *Terry* . . . based upon prudence and caution rather than on probable cause. . . ." 290 Minn. at 465, 190 N.W.2d at 651. However, it would appear that the standard adopted by the *Curtis* majority is virtually identical to that of *Terry*.

limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault."³¹

However, the permissible scope of such a search arguably is the same under both stop-and-frisk and search-incident law. In *Chimel v. California*³² the Supreme Court reiterated its holding in *Terry* that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation possible,"³³ and noted further that "a similar analysis underlies the 'search incident to arrest' principle, and marks its proper extent."³⁴ The *Chimel* Court thus invalidated a search of the full house in which defendant was arrested because the search went beyond "the area from within which he might gain possession of a weapon or destructible evidence."³⁵ In short, the search was unreasonable in scope because the possibility of defendant's obtaining a weapon in the area searched was remote. Accordingly, regardless of the legal theory employed in *Curtis*, since the purpose of searches of traffic violators is the discovery of weapons, such searches should be limited to that which is reasonably necessary for their discovery—i.e., a frisk.³⁶

Despite the ambiguity surrounding the theoretical basis for the decision, the result in *Curtis* was sound. Since searches of pedestrians without cause are invalid,³⁷ it seems consistent to refuse to permit searches of traffic violators without some evidentiary showing in addition to the mere fact of a traffic arrest. Such a rule fully accords with one of the major policy aims of the fourth amendment, that is, the prevention of arbitrary law enforcement inherent in overly broad police discretion. Since few motorists can drive without committing some infraction, a rule which would allow searches based simply upon commission of a traffic offense would grant the police authority to stop

31. *Sibron v. New York*, 392 U.S. 40, 65 (1968).

32. 395 U.S. 752 (1969). See text accompanying note 10 *supra*.

33. *Id.* at 762.

34. *Id.*

35. *Id.* at 763.

36. Although the holding of the court is restricted to a search of the person, similar and often identical considerations underlie the search of a traffic violator's auto. In the few instances when a search of the auto is justified, a proper scope would seem to encompass only that area of the auto within the driver's easy reach. "[I]f there is a criminal suspect close enough to the automobile so that he might get a weapon from it or destroy evidence within it, the police may make a search of appropriately limited scope." *Coolidge v. New Hampshire*, 403 U.S. 443, 461, n.18 (1971).

37. *Terry v. Ohio*, 392 U.S. 1 (1968).

and search virtually every driver.³⁸ Discretion so broad as to permit discriminatory enforcement and harassment should be condemned here as in other contexts.³⁹ Furthermore, the character of the typical motorist is not so markedly malicious as to create a presumption of danger which would validate searches in this context without some additional factual showing; any safety provided police officers under such a rule would be far outweighed by the freedom sacrificed. Thus, a traffic violation should support a search only upon a showing that the arresting officer reasonably feared for his safety and such a search should be strictly limited to a cursory pat-down for weapons.⁴⁰

38. [T]he practical effect of a rule permitting warrantless "full" searches incident to most traffic arrests (or for that matter incident to status crimes) is fearsome to imagine. . . . The rule that a full search without a warrant will be supported by any lawful arrest gives dangerously broad discretion to the police officers who must apply it. Logically and consistently applied, such a rule endangers the rights of the physician hurrying to a night call who runs a stop sign, or the young woman with her bags packed on her way back to college, or the corporate executive arrested for criminal conspiracy under the antitrust laws, or of the civil servant accused of tax fraud, or of any one of us a police officer—for whatever secret motive or for no reason at all—wishes to search without the hindrance of normal Fourth Amendment protections.

United States v. Robinson, 447 F.2d 1215, 1234-35 (D.C. Cir. 1971) (J. Wright's dissent).

39. "[G]ood faith on the part of the arresting officers is not enough." If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers and effects," only in the discretion of the police.

Beck v. Ohio, 379 U.S. 89, 97 (1964) (citation omitted).

[T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

United States v. Di Re, 332 U.S. 581, 595 (1948).

40. See ALI, A MODEL CODE OF PRE-ARREST PROCEDURE 36-37 (Tent. Draft No. 3, 1970):

§ SS 3.02. Search Incidental to Arrest for Minor Offenses.

(1) *Minor Offenses*. The searches and seizures authorized by the other sections of this Article shall not be authorized if the arrest is on a charge of committing a "violation" . . . a traffic offense, or a misdemeanor other than a traffic offense the elements of which involve no unlawful possession or violent, or intentionally or recklessly dangerous, conduct: *Provided*, That this subsection shall not be construed to forbid the search for dangerous weapons . . . authorized by [stop and frisk sections of the code].